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No. 16,082 ✓

IN THE

**United States Court of Appeals
For the Ninth Circuit**

KENNETH WALKER and JOSEPHINE WALKER,	} <i>Appellants,</i>
VS.	
FAIRBANKS INVESTMENT COMPANY,	
	<i>Appellee.</i>

**On Appeal from the District Court of the United States
for the State of Alaska, Fourth Division.**

BRIEF FOR APPELLEE.

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FILED

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VS.	
FAIRBANKS INVESTMENT COMPANY,	
	} <i>Appellee.</i>

**On Appeal from the District Court of the United States
for the State of Alaska, Fourth Division.**

BRIEF FOR APPELLEE.

NATURE OF CASE.

Plaintiffs were seeking in the District Court to divest the interest of defendants, Chester W. Jackson and Martha L. Jackson, purchasers under a real estate contract, and the interest of defendant, Fairbanks Investment Company, assignee of James B. and Mary Fern Ing, sellers under said contract. Plaintiffs claimed that they had a judgment lien against all of James B. Ing's interest in the real property covered by said contract, and that the conveyances of said interests were not effective as against the plaintiffs'

judgment lien, since said conveyances were not recorded at the date of the entry of said judgment against James B. Ing. The plaintiffs appeal from decision granting the Jacksons' motion for summary judgment, and Fairbanks Investment Company's motion to dismiss this cause.

PLEADINGS.

Since the decision of the trial court was based on motions for summary judgment and to dismiss, it is necessary to examine the pleadings filed.

Complaint.

On January 9, 1958, a complaint in the above entitled cause was filed against said Jacksons, Fairbanks Investment Company, and James B. Ing and his wife. (Transcript 1-8, hereafter called Tr.) The complaint, among other things, alleged that on October 25, 1957, in a separate action numbered 7807, filed by the appellants against James B. Ing, the District Court announced in open court a finding in favor of said appellants and an award of a judgment in the sum of \$20,000.00. Their request for an additional \$24,226.43 in special damages was withheld until submission of briefs. On November 9, 1957, there was a finding that appellants were entitled to said special damages, and judgment was entered and docketed against James B. Ing, in the total sum of \$44,226.43. On November 29, 1957, the court amended said judgment to reduce the

amount to \$37,673.10. Executions had been issued on November 20, 1957, against Ings' property and were returned unsatisfied. James B. Ing and his wife, on November 4, 1957, for the sum of \$5,000.00, had assigned to the appellee all their interest, by instrument dated November 4, 1957, to the real estate contract dated October 31, 1956, existing between the Ings, as sellers, and the Jacksons, as purchasers, which contract was the subject of an escrow in the Alaska National Bank of Fairbanks. In addition, the assignors had executed a quit-claim deed conveying their interest to the property covered by said contract and assignment "for use in the event of breach or default on the part of said purchasers". This assignment was recorded on December 18, 1957. The appellants alleged that it was void as against their judgment lien by virtue of *ACLA, 1949*, as amended, 55-9-63. Said real estate contract between the Ings and the Jacksons was executed on October 31, 1956, and recorded December 20, 1957, and appellants alleged that under said statute it was void as against their judgment lien.

Plaintiffs' motion for summary judgment.

On February 21, 1958, plaintiffs filed a motion for summary judgment *only against Fairbanks Investment Company*, (Tr. 9) together with affidavit by their attorney, Mr. Merdes (Tr. 10-13).

Motion to dismiss by defendants Ing.

On March 5, 1958, defendants James B. Ing and Mary Fern Ing filed a motion to dismiss.

Motion to dismiss or in alternative for summary judgment by other defendants.

On March 31, 1958, said Chester W. and Martha L. Jackson, and Fairbanks Investment Company, filed their motion to dismiss this cause, because the complaint failed to state a claim against said defendants upon which relief can be granted, or in the alternative, for a summary judgment on the ground that there was no genuine issue as to any material fact, and that said defendants were entitled to judgment as a matter of fact. (Tr. 14)

In support of said motions and in opposition to plaintiffs' motion for summary judgment, said defendants had filed affidavits of Chester W. Jackson (see Tr. 46), and the following officers and directors of said Fairbanks Investment Company: Wilbur Walker, president; Wallace Cathcart; Louis Krize, secretary; and Edward F. Stroecker, treasurer. (Tr. 15-18.)

STATEMENT OF FACTS.

The following is a brief summary of the facts predicated on the pleadings and the affidavits, which were uncontroverted at the time of the hearing on the motions:

Ing's title.

On October 23, 1953, defendant, James B. Ing, became vested with fee simple title to Lot (4), Block (52) of the Townsite of Fairbanks, by virtue of deed

executed on that date. Said deed was recorded on October 28, 1953. (Tr. 4)

Sale to Jacksons.

On October 31, 1956, James B. Ing and Mary Fern Ing entered into a written real estate contract, as sellers, with Chester W. Jackson and Martha L. Jackson, buyers, for sale of said property. (Tr. 11, 32-38) The balance of the purchase price was payable monthly in installments of \$250.00, to be paid to Alaska National Bank of Fairbanks, escrow agent, and by the latter applied to discharge payments due under a prior mortgage, and in reduction of sellers' equity. The Jacksons have had possession of said property since approximately November 1, 1956. (See Tr. 46.) They now occupy it, and have been making monthly payments under said contract on the balance of the purchase price remaining due.

Assignment by Ings.

On November 4, 1957, said James B. Ing and Mary Fern Ing, sold and assigned, in writing, all their right, title and interest as sellers under said real estate contract, and all the proceeds (balance of \$6,905.23) (Tr. 7), and benefits thereunder, to Fairbanks Investment Company, a corporation, for a consideration of \$5,000.00, paid on that date by said corporation to James B. Ing and Mary Fern Ing. Reference was made in said assignment to said contract as being the subject of an escrow at Alaska National Bank of Fairbanks. In addition, they executed and delivered a quit-claim deed to said corpo-

ration, “for use in event of breach or default on the part of said purchasers”. (Tr. 15, 16) This transaction was open and public, and not secret, since assignee desired payments under contract to come to it, through said escrow agent.

Fairbanks Investment Company.

The following persons constitute the Board of Directors of said corporate defendant: Phil Anderson, Wallace Cathcart, Jr., Joe Franich, Lloyd Burgess, Louis E. Krize (secretary), Robert B. Hoitt, Edward F. Stroecker (treasurer), Wilbur Walker (president), Lee Linck, and Walter Sczudlo (vice president and counsel for said company on this appeal). The company is in the business of buying and selling investments in both real properties, and in contracts and negotiable instruments. Under said assignment of all interest of the Ings as sellers, under said contract, said corporate assignee became entitled to all the proceeds under the contract payable to the sellers under this contract, more specifically the monthly payments, a personal property interest. The buyers under said contract were entitled to continue in possession of the property in question, and did continue in possession. (Tr. 15-16)

Plaintiffs' judgment.

On November 9, 1957, plaintiffs obtained the entry of judgment against James B. Ing in Civil Cause No. 7807, *Walker, et al. vs. Ing*, arising out of a claimed breach of contract involving sale of the Shamrock Bar

and skating rink by the Walkers to Ing. (Tr. 10) It was amended on November 29, 1957. (Tr. 2)

Defendants purchasers in good faith for value and no intent to defraud.

At no time before entry of said judgment against James B. Ing did defendants Chester W. Jackson, Martha L. Jackson, or Fairbanks Investment Company, a corporation, have knowledge of proceedings in Cause No. 7807, or that a judgment was imminent in that cause. In all their transactions with James B. Ing and Mary Fern Ing with respect to said property and contract of sale and assignment, said defendants acted as purchasers in good faith for value, and acted without any intent to hinder or defraud creditors of James B. Ing, or any other party. (Tr. 16, and 46.)

SUMMARY OF ARGUMENT.

Statement of Law.

- I. The assignment of Mr. and Mrs. Ings' interest, as vendors under the Jackson contract, to appellee, although unrecorded on November 9, 1957, the date of entry of the Walker judgment, is not void against the lien of said judgment under *ACLA 1949*, 55-9-63, because the open possession of land by the vendees under the contract of said owners to sell and convey it to them upon the payment of the purchase price in monthly installments, described in the con-

tract, is notice to creditors of the vendors, of the contract terms, and of any unrecorded assignment of the proceeds of such monthly payments made before the entry of the judgment or other grant of credits.

1. Admission of appellants.
2. Statutes regarding extent of judgment lien.
3. Leading case.
4. Meaning of word "void".
 - (a) Oregon statute.
 - (b) Interpretation and construction of Oregon statute.
5. General law on possession of property as giving actual notice.
6. General law on actual notice.
7. Uniform recording plan in Alaska.
8. Factors throwing light on legislative intent.
 - (a) A judgment lien has no superior dignity to that of other liens.
 - (b) The general law applicable to recordation of judgment liens applies in Alaska.
 - (c) There is no indication that the Alaska legislature intended by *ACLA 1949, 55-9-63*, to depart from the purpose of its general recording plan.
 - (d) Appellants' proposed construction of the Alaska statute would obviously lead

to an inequitable result, and many clouds on title.

- II. The interest of the vendor or his assignee under an executory land contract is personal property, and therefore, is not covered by judgment lien statute.
- III. Judgment lien statute does not contemplate recordation of executory contracts for sale of land.
- IV. Appellants' position is not supported by their authorities.

STATEMENT OF LAW.

- I. THE ASSIGNMENT OF MR. AND MRS. ING'S INTEREST, AS VENDORS UNDER THE JACKSON CONTRACT, TO APPELLEE, ALTHOUGH UNRECORDED ON NOVEMBER 9, 1957, THE DATE OF ENTRY OF THE WALKER JUDGMENT, IS NOT VOID AGAINST THE LIEN OF SAID JUDGMENT UNDER ACLA, 1949, 55-9-63, BECAUSE THE OPEN POSSESSION OF LAND BY THE VENDEES UNDER THE CONTRACT OF SAID OWNERS TO SELL AND CONVEY IT TO THEM UPON THE PAYMENT OF THE PURCHASE PRICE IN MONTHLY INSTALLMENTS, DESCRIBED IN THE CONTRACT, IS NOTICE TO CREDITORS OF THE VENDORS, OF THE CONTRACT TERMS, AND OF ANY UNRECORDED ASSIGNMENT OF THE PROCEEDS OF SUCH MONTHLY PAYMENTS MADE, BEFORE THE ENTRY OF THE JUDGMENT OR OTHER GRANT OF CREDITS.
- 1. Admission of appellants.

Although denied and heatedly contested in the trial court, the appellants have now conceded (their brief, p. 7) that Mr. and Mrs. Jackson's interest, as vendees under a contract of purchase with the Ings, is not

void under the statute above cited, and as alleged in their complaint, under the principle “which holds that possession of the premises by vendee under a contract of sale constitutes constructive notice of the vendee’s interest in the property to third persons, including judgment creditors of the vendor”.

The principle in question, and formulated generally by the courts, is to the effect that possession of real property is a fact putting all persons on inquiry as to the nature of the occupant’s claim, *as well as the claim of the person under whom he occupies*. (87 ALR, 1530-1540, and numerous cases cited, including the *Lynch* case, hereinafter mentioned.)

2. Statutes regarding extent of judgment lien.

The two statutes involved in this case regarding judgment liens are § 55-9-61, *ACLA*, 1949, as amended by Chapter 52, SLA 1955, and § 55-9-63, *ACLA*, 1949.

The pertinent portion of the former statute is as follows:

“... from the date of docketing a judgment in the judgment docket of the District Court, such judgment shall become a lien upon all the real property of the defendant within the recording district wherein the District Court maintains such judgment docket, and upon all the real property which the defendant may afterwards acquire therein, during the time an execution may issue thereon. . . .”

§ 55-9-63, *ACLA* 1949, reads as follows:

“*When conveyance void against lien.* A conveyance of real property or any portion thereof

or interest therein shall be void against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be.”

3. Leading case.

The leading case on the issues involved herein is *Frank Lynch Co. v. National City Bank of Chicago*, 1919, 261 F. 480.

Facts of the case. The Northern Trading Company made a contract with Arno Kresse to sell and convey to him certain real estate, free from any encumbrances, upon his payment of six promissory notes given for a part of the purchase price, maturing at various dates between November 1, 1913, the date of the contract, and October 21, 1921. Kresse immediately took possession, and continued in possession of the land. There were two recorded mortgages, which covered the land in question, and other lands. On January 21, 1916, there was owing by Kresse on his notes and contract, approximately \$4,655.00 and some interest. There were also principal balances due on the first and second mortgages. On that day, for a valuable consideration, the Trading Company indorsed Kresse's notes, and sold and delivered them, together with a written assignment of them, and of the contract, and the title, both to the land in question and to other land, to Frank Lynch Company, and delivered to it a deed thereof. On the following day, January 22, 1916, before the assignment of the contract or the deed were recorded, the National City Bank of Chicago recovered and docketed a judgment for \$15,711.50

against the Trading Company, in whose name the title to the land in question, subject to the two mortgages, appeared of record at that time.

Both the Bank and Lynch Company claimed that they were entitled to payment of the amount Kresse still owed for the purchase of the land in question, and he brought this action against each of them and against the respective holders of the two prior mortgages, offering to pay the amount he still owed on his notes, and prayed that the validity and priority of the liens on the land in question be adjudged.

North Dakota statute applied. The recording acts of North Dakota in effect at that time provided as follows:

“ . . . every conveyance by deed, mortgage or otherwise, of real estate within this state, shall be recorded in the office of the register of deeds of the county where such real estate is situated, and every such conveyance not so recorded shall be void * * * as against any attachment levied thereon or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record, prior to the recording of such conveyance, (*Compiled Laws of North Dakota, 1913, §5594*); that the term “conveyance”, as used in the last section, embraces every instrument in writing by which any estate or interest in real property is created, * * * or by which the title to any real property may be affected, except wills and powers of attorney” (section 5595); and that ‘every instrument, except a will in execution of a power, even though the power is one of revocation only,

is to be deemed a conveyance within the meaning of the chapter on recording transfers' (section 5413).''

Law applied to facts of case. The court held, in effect, with respect to the rights of assignee of vendor's rights in land contract against vendor's judgment creditor, as follows:

That "the possession of one who entered on land under a contract for the purchase thereof on installments is not only notice to the whole world of his rights, though the contract was not recorded as authorized by Comp. Laws N.D. 1913, §5594, but is notice that notes given for deferred purchase money may be negotiated, and where such notes were negotiated for a valuable consideration and the contract assigned, the assignee takes priority of one who recovered judgment against the original vendor before the assignment of the contract, etc., was recorded."

The court further stated, with respect to the statute above cited, that:

"But there is an implied general exception to the broad statement of recording statutes that unrecorded deeds and assignments of interests in real estate shall be void, to the effect that such grantees named therein and such judgment creditors as have actual or constructive notice of such unrecorded deeds or assignments are not protected by the recording statutes. *A contract by the owner of land to convey it to a grantee upon the future payment of installments of the purchase price, followed by the immediate possession of the land thereunder by the vendee, falls within*

this exception, although such a contract falls clearly far within the terms of the recording statutes. It is an 'instrument in writing * * * by which the title to any real estate may be affected'. Counsel for the bank concede that it is unnecessary to record such a contract and that such a contract supported by the possession of the vendee thereunder is not void as against a judgment creditor of the vendor notwithstanding the clear declaration of the statutes that every such conveyance is void. And why is it not void? *Because the open possession of the land by the vendee is notice to all the world of the title and of the contract under which he claims, and of all the terms thereof*, and because, when a vendor makes such a contract, he holds the legal title in trust for his cestui que trust, his vendee. The subsequent judgment creditor, the bank, therefore, had notice by the possession of Kresse when it docketed its judgment that the Trading Company's title to the southeast quarter was subject to Kresse's contract and his right thereunder, that Kresse had given his negotiable promissory notes for the unpaid purchase price, that they were negotiable, and that they might have been discounted or sold, or assigned to some third person." (Italics added.)

"* * * The open possession of land by a vendee under the contract of the owner to sell and convey it to him upon the payment of the part of the purchase price thereof evidenced by his negotiable notes described in the contract is notice to grantees, mortgagees, and judgment creditors of the vendor of the contract, of its terms, and of any unrecorded transfer by the vendor of the

vendee's notes to a third person made before the vendor made his grants or mortgage of the land, or before the judgment against him was docketed, and the transferee of the notes has, notwithstanding the recording statutes, the superior right to the payment of the notes to himself. The Trading Company in this case for value endorsed, sold, delivered, and assigned the promissory notes of Kresse to the Lynch Company before the judgment of the bank was docketed. The open possession of the land by Kresse under his contract or purchase was notice to the bank of that contract and of this sale and transfer when its judgment was docketed, although the assignment and deed accompanying the transfer were not recorded and the right of the Lynch Company to the notes, to the payments thereof to it, and to the fund derived from their payment, was under this settled rule of law on this subject in North Dakota superior to the right of the bank thereto and superior to the lien of its judgment either on the fund or on the land. The bank's judgment lien was subject to the liens of the two mortgages on the two quarter sections and to the right of the Lynch Company to the payment to it out of the southeast quarter section of the unpaid notes of Kresse, and to the fund such payments should produce."

Cases cited in Lynch decision. Two cases are cited in the *Lynch* decision, which are particularly relevant to the instant case:

Curtis v. Moore, 1897, 152 N.Y. 159, 163, 46 N.E. 168, 57 Am. St. Rep. 506, concerned an unrecorded as-

signment of a mortgagee's interest. The facts of that case are as follows: The mortgagee assigned his interest as mortgagee to an assignee. The assignee failed to record his interest. Later, the mortgagor conveyed his interest to the mortgaged premises to the mortgagee. The mortgagee then apparently held himself out to a Mr. Moore as the owner of the property in fee simple. Mr. Moore apparently assumed that the former mortgagee had good title to the land, and proceeded to purchase the property from the former mortgagee. Mr. Moore recorded his title to the property before the assignee recorded his assignment. The issue, of course, is the effect of the failure of the assignee of the mortgage to record his interest. The answer given by the court is as follows:

“Mr. Moore was not a bona fide purchaser, within the principle established by those authorities, because the record of the mortgage was notice to him that the mortgage was outstanding and unsatisfied, and it was no concern of his who happened to be the owner at the time. In dealing with the property on the assumption that Edward S. Curtis (mortgagee) still owned the mortgage, he acted at his peril, and assumed the risk that Curtis might have transferred the mortgage to someone else.”

By liberal use of paraphrasing, defendant will show that the fact situation in the *Curtis* case is quite similar to that in this case.

The Walkers were put on notice that the property once owned by James B. Ing was encumbered or possessed by a third party. They were put on such

notice because of the occupation of said property by the Jacksons. Jacksons' occupancy was notice to the Walkers that either the Jacksons had title to the property in fee simple, or that an executory land contract was outstanding and unsatisfied. In dealing with the property on the assumption that James B. Ing still owned an interest as vendor under said contract, the Walkers acted at their peril, and assumed the risk that James B. Ing might have transferred the contract to someone else.

The court, in the *Lynch* case, also discussed *Quaschneck v. Blodgett*, 32 N.D. 603, 612, 156 N.W. 216, 218. The following is quoted from page 484 of the *Lynch* decision:

“Hall was the owner of the land and Quaschneck was his vendee in possession, under Hall's unrecorded contract to convey, in which the deferred payments of the purchase price were evidenced by the vendee's negotiable notes payable to Hall. One of Quaschneck's notes was for \$3,700.00, and Hall assigned it to the Amboy Bank as collateral security for his debt to that bank. Afterwards Hall mortgaged the land to Caldwell, and Caldwell assigned the mortgage for value to Blodgett. The mortgage was recorded October 12, 1908, and the assignment was recorded December 5, 1908. Blodgett took the mortgage for value, in good faith, in reliance on the record title, and the question was whether the Bank of Amboy or Blodgett had the better right to the moneys owing by Quaschneck on his note held by the bank. The Supreme Court of North Dakota held: (1) That Quaschneck's contract for a deed was subject to the recording acts; that the recording acts were in-

applicable to that cause, because Quaschneck's open possession of the land under a contract gave notice to all the world of his rights; and (2) that that possession also gave notice to the mortgagee in, and to the assignee of, the mortgage, not only of Quaschneck's note to the Bank of Amboy, and of that bank's rights, and that the bank's right to the payment of Quaschneck's note pledged to it was superior in law and in equity to the claim thereto of Hall's mortgagee, or of that mortgagee's assignee."

Principle underlying Lynch, Curtis and Quaschneck cases. The principle underlying these cases is simple. Once a potential vendee (or judgment creditor) has notice of the existence of a possible executory land contract, he is also simultaneously put on notice that the vendor may have alienated his interest under such an executory land contract. This is a particularly reasonable inference, since the vendor's or mortgagee's interest is frequently reflected by a promissory note. Promissory notes generally are negotiable and assignable. Even if the vendor's or mortgagee's interest is not reflected by such a note, anyone dealing with such a party should know that such interests easily lend themselves to transfers and assignments. A reasonably prudent man would contemplate the likelihood of such a transfer, when he deals with a vendor or mortgagor and would make full inquiries before proceeding in transactions with a vendor or mortgagee. He would not rely on record title alone. The interests of a vendor under a contract are considered by many financial institutions as analogous to a mortgagee's interest.

4. Meaning of word "void".

The major issue in this case concerns the proper construction of the word "void", under said statute, *ACLA 1949*, 55-9-63. The issue is, "void against whom?". Fortunately, the answer is clear. It means: Void against judgment creditors, who acquired such judgment lien in good faith without knowledge or notice, actual or constructive, of such prior unrecorded conveyance of *real property*, or assignment of proceeds under an executory contract of sale.

(a) Oregon statute.

The Alaska statute is drawn directly from §18,370 of the Oregon Revised Statutes (formerly designated as 1862; D268; H271; BC207; LOL207; OL207; OC2-1603; OCLA6-803). That statute reads as follows:

"When conveyance void against lien. A conveyance of real property or any portion thereof or interest therein shall be void against the lien of a judgment unless such conveyance be recorded at the time of docketing such judgment or the transcript thereof, as the case may be."

(b) Interpretation and construction of Oregon statute.

United States v. Griswold, (Ore. 1881), 8 F. 572, well states the rule with respect to the proper construction to be given to the statute.

"In equity, a judgment creditor has not been regarded as a purchaser in the sense of the rule which prefers the right of a *bona fide* purchaser for a valuable consideration to a prior title under an unregistered deed. Story, *Eq. Jur.*, §§1502, 1503a."

“The fact that the conveyance of a subsequent purchaser, though first recorded, is not allowed by the analogous section 268 aforesaid to prevail over that of a prior purchaser, unless obtained in good faith, is a good reason why a court of equity, in administering and construing said section 268, should presume that the legislature, in enacting it, did not intend to make a conveyance void as against a subsequent judgment lien, unless the latter was acquired in good faith”.

The following annotations to §18,370 of Oregon Revised Statutes make it abundantly clear that there is only one proper interpretation of the statute. Thus:

“The intention of the legislature was to give a creditor under an attachment, judgment or execution the same standing in regard to his right in or to the property which he would gain by a purchase of the property from the debtor.” *Riddle v. Miller*, (1890) 19 Or. 468, 23 P. 807.

“The lien of a judgment will not prevail over a prior unrecorded conveyance unless it also appears that the lien was taken or acquired in good faith without knowledge or notice of such prior unrecorded conveyance.” *Baker v. Woodward*, (1884) 12 Or. 3, 6 P. 173; *Laurent v. Lanning*, (1897) 32 Or. 11, 51 P. 80; *Crossen v. Oliver*, (1900) 37 Or. 514, 61 P. 885; *Western Savings Co. v. Currey*, (1900) 39 Or. 407, 65 P. 360, 87 Am. St. Rep. 660; *Belcher v. LaGrande Nat. Bank*, (1918) 87 Or. 665, 171 P. 410; *Thompson v. Hendricks*, (1926) 118 Or. 39, 245 P. 724; *United States v. Griswold*, (1881) 8 Fed 556, 571.

“A judgment creditor who is informed of an outstanding equity or of facts sufficient to put him

on inquiry at the time his lien attached takes subject thereto." *Stannis v. Nicholson*, (1868) 2 Or. 332; *Riddle v. Miller*, (1890) 19 Or. 468, 23 P. 807.

"Possession of a purchaser under unrecorded deed charges the judgment creditor with notice of the grantee's rights, though the premises were in possession of the same persons before and after conveyance." *Belcher v. LaGrande Nat. Bank*, (1918) 87 Or. 665, 171 P. 410.

5. General law on possession of property as giving actual notice.

"Possession of land is notice to the world of every right that the possessor has therein, legal or equitable; it is a fact putting on inquiry as to the nature of the occupant's claims as well as the person under whom he claims." *American Jurisprudence, Notice and Notices*, § 18, *Possession of Land*.

"Possession of land is a fact putting all persons on inquiry as to the nature of the claim of the occupant and of the person under whom he occupies . . ." *American Jurisprudence, Vendor and Purchaser*, § 712, *Possession and Use of Property*.

In the instant case, plaintiff had been put on inquiry as to the interests of the Jacksons, as purchasers of land, who were in possession, open and notorious, since approximately November 1, 1956, and of the interest of Fairbanks Investment Company, Inc., the party under whom they occupy the premises. There was no proof or facts shown, or alleged, in appellants' complaint or affidavits that any inquiry was made by

them of the Jacksons as to the nature of their claim and of the person under whom they occupied. There was nothing shown by the appellants that such inquiry would not have disclosed that payments were being made to the escrow agent and by the latter to the prior mortgage holder, and to the assignee of the vendors.

6. General law on actual notice.

“It is an elementary rule in the construction of recording laws that notice of an unrecorded instrument is equivalent to recording of it, with respect to the person having such notice. As a general rule, an unrecorded deed or other instrument affecting the title to land is valid, therefore, against a subsequent purchaser taking with knowledge or notice of the existence of the instrument; and while this exception is usually the result of construction, yet is sometimes expressly declared by the statute.” *American Jurisprudence, Records and Recording Laws*, § 172, *Effect of notice other than record*.

7. Uniform recording plan in Alaska.

The general recording statute in Alaska is § 22-3-25, *ACLA 1949*, as amended by Ch. 9, *SLA 1955*, which reads as follows:

“Every conveyance of real property within the Territory of Alaska hereafter made, other than a lease for a term not exceeding one year, shall be void as against any subsequent innocent purchaser or mortgagee in good faith and for a valuable consideration of the same real property or any portion thereof, whose conveyance shall be

first duly recorded. An unrecorded instrument is valid as between the parties thereto and those who have actual notice of it.”

This is the type of recording statute common throughout the United States. It gives potential vendees and transferees full protection from fraudulent conveyances. That is the only purpose of the statute and the purpose is fully achieved. §22-4-3, *ACLA 1949*, relates directly to fraudulent conveyances. It, too, is consistent with §22-3-25, *ACLA 1949*, and is completely inconsistent with appellants’ proposed construction of the judgment lien statutes. It provides as follows:

“Purchasers with notice. No such conveyance or charge shall be deemed fraudulent in favor of a subsequent purchaser who shall have actual or legal notice thereof at the time of his purchase, unless it shall appear that the grantee in such conveyance, or person to be benefited by such charge, was privy to the fraud intended.”

Thus, it would appear that the Alaskan legislature intended to erect a uniform recording plan for the recordation of all interests subject to recordation, including judgment liens. It also appears that the legislature intended the same consequences upon failure to record should be borne in equal degree by any holders of unrecorded interests, without particular discrimination against any one class of such holders. In short, the term “purchasers or lienors” *without notice* is a common denominator of all the Alaska

statutes regarding recordation, whether this is spelled out in the statutes in that particular manner or not.

8. Factors throwing light on legislative intent.

There is no indication that the legislature intended to depart from the general rules applicable to judgment lien statutes. In support of appellants' construction of the judgment lien statute, appellants are compelled to urge that the Alaska legislature intended one or more of the following:

(a) That a judgment lien should be given some superior dignity to all other liens.

(b) That Alaska should have a set of recording laws entirely inconsistent or in conflict with each other, and with recording laws as they exist in the various states of the union.

(c) That the legislature intended that holders of interests in property potentially subject to judgment liens against prior owners could be suddenly and inequitably divested of their interests by judgment creditors of such prior owners, with notice.

(d) That it was intended to subject unrecorded interests in land to many potential clouds on their title.

The following should be noted briefly with reference to each of these points:

(a) A judgment lien has no superior dignity to that of other liens.

“A judgment lien does not prevail as against other interests upon the ground that it is of superior dignity. To the contrary, the general rule is that the lien of a judgment is subject to interests

previously acquired." *Bowling v. Garrett*, 49 Kan. 504, 31 P. 135, 33 Am. St. Rep. 377. See also *American Jurisprudence, Judgments*, §343, p. 38.

- (b) The general law applicable to recordation of judgment liens applies in Alaska.

These general rules are as follows:

"Again, the general rule is that a judgment creditor having at the time judgment is entered notice of an unrecorded deed or mortgage already executed by the judgment debtor will take subject thereto." 185 U.S. 505, 4 ALR 442. See also *American Jurisprudence, Records and Recording Laws*, §§ 153, 154, 167.

"The general rule that constructive notice of an outstanding interest in land may be predicated upon possession of the property has been applied as against judgment creditors." *American Jurisprudence, Judgments*, § 362, p. 48. See also: *Groff v. State Bank*, 50 Minn. 234, 52 N.W. 651; *Allen-West Commission Co. v. Millstead*, 92 Miss. 837, 40 So. 256; *Butcher v. Kagey Lumber Co.*, (Ohio) 128 N.E. 2d 54.

It must be assumed that the Alaska legislature did not intend by *ACLA 1949, 55-9-63*, pertaining only to judgment liens, to create a recordation statute that is completely inconsistent with other Alaska recording statutes. (See pars. 1 and 7, *supra*.)

- (c) There is no indication that the Alaska legislature intended by *ACLA 1949, 55-9-63*, to depart from the purpose of its general recording plan.

The evident purpose, indeed the only conceivable purpose, in enacting recording statutes is to protect

purchasers or encumbrancers of property against fraudulent conveyances.

The Alaska statutes, 22-4-1, et seq., accordingly provide for protection of innocent purchasers against fraudulent conveyances. 22-4-3 expressly limits the protection of these statutes to those purchasers who do not have actual or legal notice of the fraudulent nature of the purchase. (See sec. I, pars. 1 and 7, supra.) 22-3-25 creates the general Alaska recording scheme whereby recordation would give constructive notice only to those individuals who are "innocent purchasers in good faith and for a valuable consideration."

If the legislature had intended to give judgment liens some special dignity, and make sec. 55-9-63 inconsistent with the general recording plan adopted in Alaska, it would seem that it would have used language, which would clearly indicate that intent. For example, the legislature could have provided that all unrecorded conveyances of real property shall be void against the lien of a judgment, except as between the parties thereto, whether the judgment lienor is with or without actual notice of such conveyance. It is obvious that the legislature would not desire a judgment lienor with notice to take against innocent purchasers, unless it clearly indicated a contrary intent.

(d) Appellants' proposed construction of the Alaska statute would obviously lead to an inequitable result, and many clouds on title.

Appellee believes that the inequity of appellants' proposed construction of the statute is too manifest to require discussion. Appellee would, however, like to point out that there is the following practical danger

in construing the statute as appellants' urge. Unscrupulous individuals could examine title records. Whenever a transfer in a real property interest could be found, which was not properly recorded, a suit could be trumped up against the former holder of the property or an assignment of a dubious cause of action against the former holder might be arranged. Suit could then be brought against the former holder. It is likely that a default judgment could be obtained against the former holder of the property, and thereby a lien could be obtained against the recorded interest in his property. The statute would then be an invitation to fraud.

There have been many judgments probably rendered in past years against individuals, who have conveyed their interest in real property before the date of a judgment against the conveyor. Such conveyances have not been recorded, since the conveyances were a matter of general knowledge, either by actual or constructive notice before the date of judgment. This would certainly be true in instances where the purchaser has moved on the property of the judgment debtor before the date of the judgment. The number of possible clouds on real properties in the State of Alaska would be greatly increased, if all unrecorded interests in real property were subjected to any judgment liens, which have come into existence against the conveyors after unrecorded conveyances and within the last ten (10) years.

II. THE INTEREST OF THE VENDOR OR HIS ASSIGNEE UNDER AN EXECUTORY LAND CONTRACT IS PERSONAL PROPERTY, AND THEREFORE, IS NOT COVERED BY JUDGMENT LIEN STATUTE.

§55-9-63, the judgment lien statute, applies only to, "A conveyance of real property or any portion thereof or interest therein . . ."

Under the doctrine of equitable conversion, the vendor's interest in a contract of purchase and sale of real property is converted into personal property upon execution of the contract. Thus, in *American Jurisprudence, Equitable Conversion*, §11, *Contract*, it states:

"Thus, an executory contract for the sale of land works a conversion, since equity regards 'things agreed to be done as actually performed', and treats the vendor as holding the land in trust for the purchaser and the purchaser as a trustee of the purchase price for the vendor. The vendee is, in the contemplation of equity, actually seized of the estate, . . . It is a well-established principle that, pending the completion of an enforceable executory contract for the sale of real estate, such real estate is regarded as converted into personalty from the time of the execution of the contract, notwithstanding the fact that an election to complete the purchase rests entirely with the purchaser."

Looking at this from a practical point of view, after the contract has been entered into, the primary intention of the vendor or the vendor's assignee is to receive periodical payments from the vendee. It is the contract right to receive such payments that the ven-

dor or his assignee is primarily interested in, and not the possibility of declaring the vendee in default and of eventually foreclosing.

Consequently, the interest of Fairbanks Investment Company is personalty, and is therefore outside the scope of the judgment lien statute, which applies to conveyances of real property.

III. JUDGMENT LIEN STATUTE DOES NOT CONTEMPLATE RECORDATION OF EXECUTORY CONTRACTS FOR SALE OF LAND.

It is clear that the recording statutes and judgment lien statutes contemplate that outright sales or transfers of real property shall be covered. However, many transactions, which might be deemed to affect real property interests, are not necessarily included.

Bamberger v. Geiser, (Or.) 33 P. 609, is a case which is useful in delineating the scope of Alaska recording statutes, since many of the Alaska recording statutes derive from Oregon. The general recording statute of Alaska, §22-3-25, *ACLA 1949*, before it was amended in 1955, read the same as the analogous Oregon statute:

“Invalidity of unrecorded conveyance against subsequent innocent purchaser. Every conveyance of real property within the Territory hereafter made which shall not be filed for record as provided in this chapter, shall be void against any subsequent innocent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded.”

The present wording of the above statute is given under sec. I, par. 7, *supra*.

In commenting on the effect of recording an assignment of a mortgage, and whether such recordation would give constructive notice or not, the Oregon court said at page 612 of the *Bamberger* case, quoting with approval from *Trust Co. v. Shaw*, 5 Sawy. 340:

“... An assignment of a mortgage may be made by an instrument in the form of a conveyance, and in such case may be admitted to record. But an assignment of a mortgage may be a mere writing under the hand of the assignor, declaring that he thereby assigns the mortgage to a person therein named. Such a writing is effectual to pass a lien of the mortgage, but it would not be entitled to record unless acknowledged and certified; ... In the absence, then, of any legislative direction to that effect, there does not seem to be any obligation resting upon an assignee to record his assignment to protect himself against any subsequent purchaser or mortgagor.”

The *Bamberger* case was cited with approval in *Fischer v. Woodruff*, Wash., 64 P. 923. There the court stated at page 924:

“As the purpose of these acts is to protect subsequent bona fide purchasers and incumbrancers against prior unrecorded liens and conveyances, their propriety and utility may be conceded; but registration of instruments affecting property rights and titles is purely the creation of the statute, and, unless the statute requires the assignee of a mortgage to record the assignment, he is not guilty of negligence in failing to do so . . . ”

The position of the assignee of a seller under a contract of purchase and sale is analogous to that of the assignee of the mortgagee referred to in the above cases. (Tr. 7-8.) Financial institutions often treat the interest of a vendor under an executory contract for sale of land and providing for monthly payments, or notes evidencing same, as in the nature of a mortgage.

In absence of any statutory direction requiring the assignee of a land vendor to record an assignment, he is not guilty of negligence in failing to do so, nor is he obligated to do so to protect himself against any subsequent purchaser of the vendor's interest in the contract. Again, there is no indication that the legislature intended to give a holder of a subsequent judgment lien any greater dignity, or rights, or protection.

There is an obvious distinction between the position of the vendee and his assignee, and that of the vendor and his assignee. When a vendee under an executory land contract, or his assignee, negotiates and bargains with respect to a certain piece of property, he bargains with intent to acquire ownership, possession, and control of real property. On the other hand, the vendor, or his assignee, bargains and negotiates with intent to relinquish title, possession, and control of real estate, and in its place to acquire personal property, ordinarily money or the right to receive money.

IV. APPELLANTS' POSITION IS NOT SUPPORTED BY THEIR AUTHORITIES.

The cases cited by the appellants fail to support the arguments they present. They do not apply to the facts presented in this cause.

Thus, in *Kooper v. Haas*, 164 N.E. 23 (p. 12 of the appellants' brief), there is an attempted dedication and an acceptance, both of which did not appear as a matter of record in the Torrens registrar's office. The following statement of the court at p. 26 of the opinion should be noted, however:

“* * * The lien of an ordinary judgment is general, and extends only to the property right which the owner owns in premises, subject to the equities in it at the date of judgment. It is limited to the actual interest of the judgment debtor. * * * Unless the judgment creditor is able to point to some statute specifically giving him a right to a greater interest than that which the judgment debtor actually owns, he is limited to that right. Section 30 of the Conveyance Act (Smith-Hurd Rev. At. 1927, c. 30, §29), provides that deeds, mortgages, and other instruments in writing, which are authorized to be recorded, shall take effect and be in force from and after the time of filing the same for record, and not before, as to all creditors and subsequent purchasers without notice. By this section a judgment creditor is entitled to priority over the holder of an unrecorded conveyance. Section 30, however, is intended to apply only to such equities arising against the interest of the judgment debtor as are to be evidenced by instruments required to be recorded. Since no particular form is necessary

for the establishment of a common-law dedication, such a dedication may arise through circumstances, at least some of which are not susceptible of record. * * *”

In *Pennsylvania Range Boiler Co. v. City of Philadelphia*, 23 A 2nd 723, (appellants’ brief, p. 13) there was involved an award in eminent domain, release of future damages, and claim by subsequent purchaser without actual notice thereof. At p. 725 the court stated:

“* * * Concerning what constitutes notice, it was said, in *Re Tabor Street* (No. 1), 26 Pa. Super. 167, 173: ‘* * * whatever puts a party upon inquiry amounts in judgment of law to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding * * *’ * * *”.

In *re Frayser’s Estate*, 82 N.E. 2d 633 (appellants’ brief, p. 14), there was a proceeding by an administrator with will annexed against decedents’ heirs for authority to execute deed conveying land pursuant to an option agreement executed by decedent. At p. 638 the court observed:

“* * * A sale of lands is the actual transfer of the title from grantor to grantee by an *appropriate instrument of conveyance*. An agreement to sell lands is a contract to be performed in the future, and if fulfilled results in a sale. * * *” (Italics added.)

In this appeal the following facts are important to keep in mind:

(a) There was an open assignment by the vendors of an executory contract to the appellee. It was not a secret assignment, which was not disclosed by the assignor and the assignee, as was the case in *National Bank v. Chafee*, 73 N.W. 318 (appellants' brief, p. 17).

(b) The assignment in this appeal was of payments under an executory contract, which payments were made by the vendee to a bank, as escrow agent. (There was also a quit-claim deed.)

(c) The possession of the vendee was open and notorious, and admitted by the appellants.

(d) There was no effort by the judgment creditors, the appellants, to ascertain of the vendees in possession as to the nature of their claim, or the claim of the persons under whom they occupied.

The following cases on which appellants depend so much can readily be distinguished on the above facts, as well as on the law, as applied in the *Lynch* case above cited, and as applied in Oregon from where the Alaska statute was taken:

Damron v. Smith, 16 S.E. 807 (appellants' brief, p. 16), (the assignor remained in possession, and no payments were involved under the contract assigned.); *Huffaker v. First National Bank of Brigham City*, 173 P. 903, appellants' brief, p. 17, (no constructive notice could be given by a warranty deed in trust involved in this cause.); *Battersby v. Gillespie*, 220

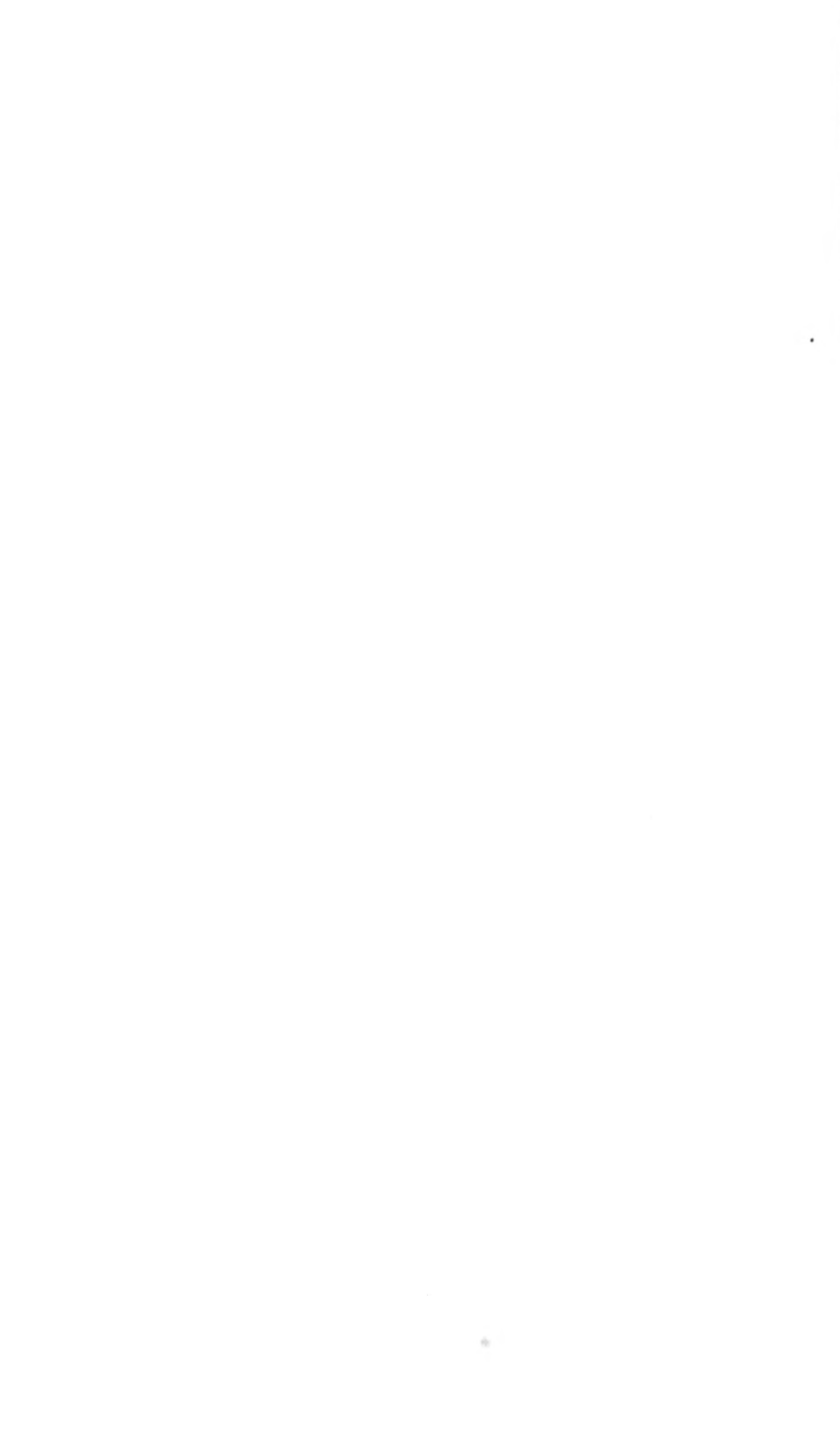
N.W. 480, appellants' brief, p. 17, (the recording statute involved was different from that involved in Alaska, and apparently the parties to the cause failed to consider the claims of the vendor under which the parties in possession occupied.); *Salisbury v. LaFitte*, 141 P. 484, appellants' brief, p. 17, (this case involved an option from an owner to purchase real estate.); *Johnson v. Strong*, 20 NYS 392, appellants' brief, p. 17, (in this cause there was indication that the vendee had abandoned his contract.).

CONCLUSION.

For the various reasons above stated, it is respectfully submitted that the decision of the trial court should be affirmed.

Dated, Fairbanks, Alaska,
February 9, 1959.

WALTER SCZUDLO,
Attorney for Appellee.



No. 16083

United States
Court of Appeals
for the Ninth Circuit

MARIA DE LA LUZ VIRUETTE TORRES,
Appellant.

vs.

RICHARD C. HOY, Acting Director, Immigration
and Naturalization Service, Los Angeles, Cali-
fornia,
Appellee.

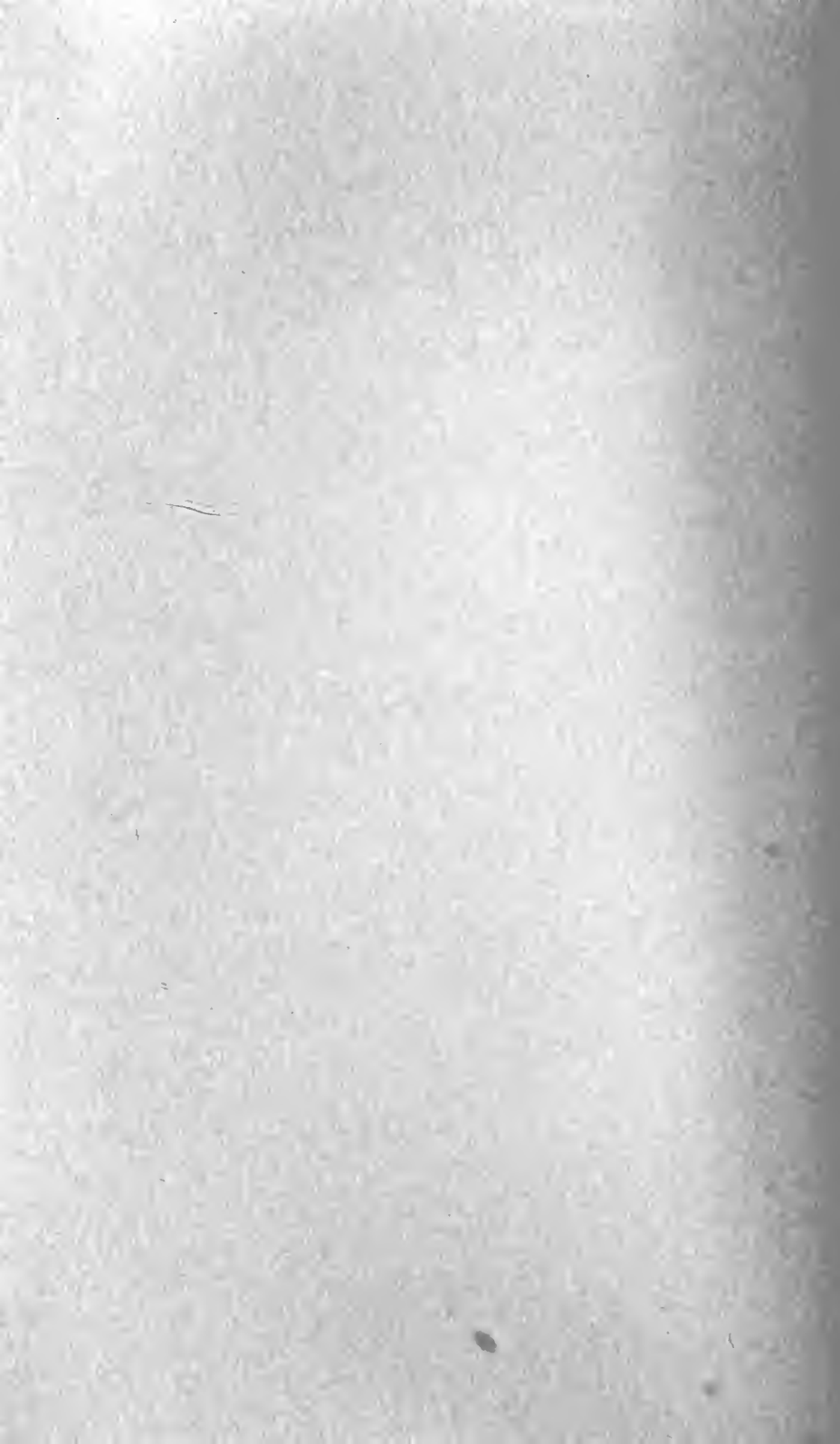
Transcript of Record

Appeal from the United States District Court for the
Southern District of California
Central Division

FILED

JAN 29 1958

PAUL F. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court in and for the
Southern District of California, Central Division

No. 1146-57—Y

MARIA DE LA LUZ VIRUETTE TORRES,

Plaintiff,

vs.

RICHARD C. HOY, Acting District Director of
the Immigration & Naturalization Service, Los
Angeles, California,

Defendant.

COMPLAINT FOR JUDICIAL REVIEW

Plaintiff, Maria De La Luz Viruette Torres, complains of defendant and for cause of action alleges:

I.

This complaint is filed and these proceedings are instituted against the defendant, pursuant to Title 28, U. S. C. A., Section 2201 and Title 5, U. S. C. A., for a judgment declaring that plaintiff is not deportable.

II.

The plaintiff is a resident of Los Angeles, County of Los Angeles, State of California, within the jurisdiction of this Court.

III.

The defendant, Richard C. Hoy, is the duly appointed, qualified and acting District Director in Charge of the Immigration and Naturalization

Service, Department of Justice, Los Angeles, California; that Louis L. Mattel, Special Inquiry Officer, Immigration and Naturalization Service, Los Angeles, California, and the members of the Board of Immigration Appeals, Washington, D. C., are, and at all times herein complained were, executive officials within the Department of Justice.

IV.

The plaintiff is a native and citizen of Mexico, 39 years of age, who was admitted to the United States for permanent residence on November 2nd, 1950; that she last entered the United States at San Ysidro, California, on or about August 19th, 1956.

V.

That the plaintiff herein was granted a hearing by the United States Immigration and Naturalization Service to show cause why she should not be deported from the United States; that pursuant to show order to show cause, hearings were accorded the plaintiff by Louis L. Mattel, Special Inquiry Officer, Los Angeles, California, and on April 4th, 1957, the said Louis L. Mattel rendered a deportation order that plaintiff be deported from the United States on the following grounds, to wit:

(1) That under section 241 (a) (1) of the Immigration and Nationality Act, the respondent is subject to deportation because she was excludable at the time of the entry, having procured a visa by fraud or wilful misrepresentation which is pro-

hibited by Section 212 (a) (19) of the Immigration and Naturalization Act.

VI.

On September 6th, 1957, the Board of Immigration Appeals, Washington, D. C., ordered that plaintiff's appeal from the decision of the Special Inquiry Officer, dated April 4th, 1957, holding the alien deportable be dismissed.

VII.

On or about September 17th, 1957, the defendant issued a letter directing plaintiff's deportation to Mexico, and the defendant through his subordinate officials, threatens to and intends to deport plaintiff from the United States.

VIII.

There is no reliable probative and substantial record confirming the charge that plaintiff obtained a visa by fraud or wilful misrepresentation; therefore, the deportation hearings accorded the plaintiff by the aforesaid Louis L. Mattel, was unfair.

Wherefore, plaintiff prays that the court review the record of her deportation proceedings and enter judgment that she is not deportable by reason of being excludable at the time of the entry for having procured a visa by fraud or misrepresentation.

/s/ JACK SURINSKY,

Attorney for Plaintiff.

Duly verified.

[Endorsed]: Filed September 30, 1957.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

The defendant above named by and through the undersigned answers the complaint on file herein as follows:

I.

Neither admits nor denies the allegations contained in paragraph I on the ground that said allegations are conclusions of law.

II.

In answer to paragraph II, defendant does not have sufficient information on which to base a belief and on that ground denies generally and specifically all the allegations contained therein.

III.

In answer to paragraphs III, IV, V, and VI, defendant admits the allegations contained therein.

IV.

In answer to paragraph VII of the complaint herein, the defendant denies the allegations contained therein and affirmatively states that the Immigration and Naturalization Service has not and will not take any action to remove the plaintiff from the jurisdiction of the Court during pendency of the within action.

V.

In answering the allegations contained in paragraph VIII, the defendant denies the same.

For a Further Separate and First Affirmative Defense to Said Complaint Defendant Alleges:

The plaintiff has been accorded a full and fair hearing in conformity with law to determine her right to be and remain in the United States. There will be offered in evidence when this cause is tried, a certified record of the Immigration and Naturalization Service, Department of Justice, relating to the plaintiff containing the complete record of the deportation proceedings before the Immigration and Naturalization Service.

For a Further Separate and Second Affirmative Defense to Said Complaint Defendant Alleges:

Plaintiff's complaint on file herein fails to state a claim upon which relief can be granted and this court can acquire no jurisdiction over this case for the reason that plaintiff has failed to abide by rule 8(a)(1) of the Federal Rules of Civil Procedure. Plaintiff's complaint cites Title 5 U.S.C.A. as the jurisdictional statute under which plaintiff proceeds. Title 5 contains many sections and statutes and the citing of Title 5, U.S.C.A., without designating a particular statute claimed as the jurisdictional basis for the action will not be sufficient to confer jurisdiction on this Court.

Wherefore, defendant prays for a judgment dismissing said complaint, denying the relief prayed for therein and for such other relief as to the court seems just and proper in the premises.

LAUGHLIN E. WATERS,
United States Attorney;

RICHARD A. LAVINE,
Assistant U. S. Attorney,
Chief Civil Division;

/s/ NORMAN R. ATKINS,
Assistant U. S. Attorney,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed November 26, 1957.

[Title of District Court and Cause.]

DECISION

The above-entitled petition to review heretofore tried, argued and submitted is now decided as follows:

The petition to review the Order of the Special Inquiry Officer dated April 4, 1957, that the plaintiff be deported from the United States on the following ground, to wit:

“(1) That under section 241(a)(1) of the Immigration and Nationality Act, the respondent is

subject to deportation because she was excludable at the time of the entry having procured a visa by fraud or wilful misrepresentation which is prohibited by Section 212(a)(19) of the Immigration and Naturalization Act."

Affirmed by the Board of Immigration Appeals on September 6, 1957, notice of which was given to the plaintiff on September 17, 1957, is hereby dismissed and the said order of deportation is hereby affirmed.

Formal findings and Order denying the complaint for judicial review and dismissing the complaint to be prepared by counsel for the Government under local Rule 7.

Comment

The plaintiff was ordered deported as the result of a hearing before a Special Inquiry Officer on April 4, 1957, because she procured a visa by fraud or wilful misrepresentation prohibited by Section 212(a)(19) of the Immigration and Nationality Act, 8 U.S.C.A., § 1182(a)(19). Her complaint attacks the sufficiency of the evidence on which the order was based. A study of the entire administrative record convinces me that there is substantial evidence in the record to sustain the ground upon which deportation was based. Indeed her own admissions at the hearing, where she was represented by counsel, would alone be sufficient to show wilful fraud and misrepresentation.

When the record is considered as a whole the conclusion is inevitable that the order of deportation was "based upon reasonable, substantial and probative evidence." (24 (b)(4) Immigration and Nationality Act; 8 U.S.C.A., § 1101(b)(4). *Landon v. Clarke*, 5 Cir., 1956, 239 F.2d 630, 634-635; *Ablett v. Brownell*, U.S. App. D.C., 1957, 240 F.2d 625, 630-631; *Duran-Garcia v. Neely*, 5 Cir., 1957, 246 F.2d 287, 291-292.)

The representations she made were wilful and made for the purpose of concealing facts which otherwise might have resulted in denial of the visa. The fact that she was advised by others, whom she employed to advise her, to do so is unimportant. She accepted the advice because she was told she would otherwise not obtain the visa, and she followed it. So all elements of materiality, substantiality and wilfulness required by the law are present in this case.

Hence the ruling above made.

Dated this 14th day of April, 1958.

/s/ LEON R. YANKWICH,
United States District Judge.

[Endorsed]: Filed April 14, 1958.

United States District Court for the Southern
District of California, Central Division

Civil No. 1146-57—Y

MARIA DE LA LUZ VIRUETTE TORRES,

Plaintiff,

vs.

RICHARD C. HOY, Acting District Director of
Immigration and Naturalization Service, Los
Angeles, California,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW. AND JUDGMENT

The above-entitled matter having come on for trial on April 8, 1958, in the above-entitled Court before the Honorable Leon R. Yankwich, Judge, presiding without a jury; the plaintiff being represented by her attorney, Jack Surinsky; the defendant being represented by his attorneys, Laughlin E. Waters, United States Attorney; Richard A. Lavine and Norman R. Atkins, Assistants United States Attorney, by Norman R. Atkins; and counsel for the parties hereto having stipulated that a certified record of the Immigration and Naturalization Service be received in evidence, and the Court having received the same; and the Court having heard the arguments of counsel and having taken the within cause under submission; and the Court having reviewed the aforementioned record of the Immigration and Naturalization Service relating

to the plaintiff, and being fully advised in the premises, now makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

Plaintiff is an alien, a native and national of Mexico. Plaintiff last entered the United States at San Ysidro, California, on or about August 19, 1956, as a returning resident.

II.

On November 1, 1950, plaintiff applied for an immigration visa at Tijuana, Mexico. On November 2, 1950, plaintiff's application was granted; plaintiff was admitted for permanent residence at San Ysidro as a non-quota immigrant.

III.

On December 20 and December 26, 1956, a hearing in deportation proceedings was held; on April 4, 1957, a Special Inquiry Officer found that plaintiff was deportable on the following ground, and the Special Inquiry Officer made an order, to wit:

“(1) That under Section 241 (a)(1) of the Immigration and Nationality Act, the respondent is subject to deportation because she was excludable at the time of entry, having procured a visa by fraud or wilful misrepresentation which is prohibited by Section 212(a)(19) of the Immigration and Naturalization Act.”

IV.

Plaintiff appealed to the Board of Immigration Appeals. On September 6, 1957, the said Board of Immigration Appeals affirmed the decision of the Special Inquiry Officer. Notice of said affirmance was given plaintiff on September 7, 1957.

V.

The order of deportation described in paragraph III herein was based on reasonable, substantial and probative evidence; the said order of deportation was based on reasonable, substantial and probative evidence that plaintiff had procured the above-described immigration visa by fraud and by wilful misrepresentation of material facts.

VI.

The said order of deportation was based on reasonable, substantial and probative evidence that plaintiff had wilfully misrepresented, in obtaining the immigration visa described in paragraph II herein, the following: (1) That plaintiff was not a person previously deported, or ordered deported and permitted to leave the United States voluntarily under the order of deportation; (2) that she had not been arrested or indicted for or convicted of any offense; (3) that she was not a person previously excluded from the United States at a port of entry; and (4) that she had resided at the following places since the age of 14 years: Tala, Jalisco, Mexico, 1932-1946; Tijuana, Mexico, 1946-1950.

VII.

The misrepresentations described above in paragraph VI which plaintiff made were made wilfully and made for the purpose of concealing facts which otherwise might have resulted in denial of the above-described visa.

VIII.

The Immigration officials who acted in connection with the deportation proceedings relating to plaintiff had jurisdiction and authority to act.

IX.

The deportation proceedings relating to plaintiff were fair, were in accordance with the law and in accordance with plaintiff's constitutional rights.

Conclusions of Law

I.

This Court had jurisdiction of the within cause under the provisions of section 10 of the Act of June 11, 1946. (Administrative Procedures Act, 60 Stat. 243, 5 U.S.C.A. 1009.)

II.

The Immigration officials who acted in connection with the deportation proceedings relating to plaintiff had jurisdiction and authority to act.

III.

There is reasonable, substantial and probative evidence to support the decision of deportability,

the order of deportation outstanding against the plaintiff.

IV.

The deportation proceedings relating to the plaintiff were fair, were in accordance with law, and were in accordance with the plaintiff's constitutional rights.

V.

The representations described in paragraph VI of the Findings of Fact herein were made wilfully and made for the purpose of concealing facts which otherwise might have resulted in denial of the visa.

VI.

The fact that plaintiff may have been advised by others, whom she employed to advise her, to make misrepresentations is irrelevant and immaterial to the issues of the within action.

VII.

The order of deportation outstanding against the plaintiff is valid and the plaintiff is deportable pursuant to said order.

VIII.

Judgment should be entered in favor of the defendant and against the plaintiff, denying the relief prayed for in plaintiff's complaint, and awarding to the defendant his costs incurred herein.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed:

1. That judgment is hereby entered in favor of the defendant and against the plaintiff, denying the relief prayed for in plaintiff's complaint.

2. That the defendant have his costs incurred herein.

Dated: May 1, 1958.

Costs taxed \$20.00.

/s/ LEON R. YANKWICH,
United States District Judge.

Affidavit of service by mail attached.

Lodged: April 25, 1958.

[Endorsed]: Filed May 1, 1958.

Entered: May 2, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Maria De La Luz Viruette Torres, Plaintiff, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in the above action on May 2nd, 1958.

Dated May 21, 1958.

/s/ JACK SURINSKY,
Attorney for Appellant.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 30, inclusive, containing the original:

Complaint.

Answer to Complaint.

Plaintiff's Trial Memorandum.

Defendant's Trial Memorandum.

Decision of Court.

Findings of Fact, Conclusions of Law and Judgment.

Notice of Appeal.

Designation of Record on Appeal.

B. Defendant's Exhibit "A."

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: June 26, 1958.

JOHN A. CHILDRESS,
Clerk,

[Seal] By /s/ WM. A. WHITE,
Deputy Clerk.

[Endorsed]: No. 16083. United States Court of Appeals for the Ninth Circuit. Maria De La Luz Viruette Torres, Appellant, vs. Richard C. Hoy, Acting Director, Immigration and Naturalization Service, Los Angeles, California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: June 28, 1958.

Docketed: July 12, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 16083

MARIA DE LA LUZ VIRUETTE TORRES,

Appellant,

vs.

RICHARD C. HOY, Acting District Director of
Immigration and Naturalization Service, Los
Angeles, California.

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT RELIES

Appellant sets forth the following points upon
which she intends to rely on appeal:

I.

The Court erred in finding and holding that the order of deportation made by the special inquiry officer "Subdivision 1." That under Section 241 (A) (1) of the Immigration and Nationality Act, the respondent is subject to deportation because she was excludable at the time of entry, having procured a visa by fraud or wilful misrepresentation which is prohibited by Section 212 (A) (19) of the Immigration and Naturalization Act." That said order and finding was based upon reasonable substantial and probative evidence.

II.

The Court erred in finding and holding that appellant had procured an immigration visa issued to her on November 2, 1950, by means of fraud and wilful misrepresentation.

III.

The Court erred in finding and holding that the aforesaid deportation order was based upon reasonable, substantial, and probative evidence that plaintiff had wilfully misrepresented, in obtaining the immigration visa the following: (1) That plaintiff was not a person previously deported or ordered deported and permitted to leave the United States voluntarily under the order of deportation; (2) That she had not been arrested or indicted for or convicted of any offense; (3) That she was not a person previously excluded from the United States at a port of entry; and (4) That she had resided at the following places since the age of 14 years: Tala, Jalisco, Mexico, 1932-1946; Tijuana, Mexico, 1946-1950.

IV.

The Court erred in finding and holding that the appellant made any such misrepresentations wilfully and for the purpose of concealing facts which otherwise might have resulted in denial of the aforesaid visa.

V.

The Court erred in finding and holding that deportation proceedings relating to plaintiff were fair

and in accordance with the law and plaintiff's constitutional rights.

VI.

The Court erred in holding that the Order of Deportation outstanding against appellant is valid and appellant is deportable pursuant to said order.

VII.

The Court erred in entering a judgment in favor of appellee, denying the relief that had been prayed for in plaintiff's complaint and awarding the plaintiff's costs.

Respectfully submitted,

/s/ JACK SURINSKY,

Attorney for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed December 20, 1958.

No. 16089 ✓

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO, LOCAL UNION NO.
13-433, Respondent.

Transcript of Record

Petition For Enforcement of an Order of the
National Labor Relations Board

FILED
OCT - 9 1958
PAUL P. O'BRIEN, CLERK



No. 16089

United States
Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO, LOCAL UNION NO.
13-433, Respondent.

Transcript of Record

Petition For Enforcement of an Order of the
National Labor Relations Board

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

THOMAS J. McDERMOTT,
Assistant General Counsel,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board,
Washington, D. C.,
Attorneys for Petitioner.

HALPIN & HALPIN,
1428 West Street,
Redding, California,
Attorneys for Respondent.

GENERAL COUNSEL'S EXHIBIT No. 1-A

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS

Case No. 20-CB-408. Date Filed: 6-14-55.

* * * * *

1. Labor Organization or Its Agents Against
Which Charge Is Brought:

Name: International Woodworkers of America
affiliated with C. I. O. and Canadian Congress of
Labour, Local 13 - 433, Robert P. Crimmins, Agent
(bus.).

Address: P. O. Box 923, Anderson, California.

The above-named organization or its agents has
engaged in and is engaging in unfair labor prac-
tices within the meaning of Section (8b) Subsec-
tions (1)(A) and (2) of the National Labor Rela-
tions Act, and these unfair labor practices are un-
fair labor practices affecting commerce within the
meaning of the Act.

2. Basis of the Charge:

On or about May 17, 1955, it, by its officers and
agents, caused Ralph L. Smith Lumber Co. to dis-
charge Charles Hatfield because of his lack of
membership in said Union, membership having been
denied him on some ground other than his failure to
tender his periodic dues and initiation fees uni-

General Counsel's Exhibit No. 1-A—(Continued)
formly required as a condition of acquiring membership.

By the above act, and by other acts and conduct, it, by its officers and agents, restrained and coerced employees, and is restraining and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

3. Name of Employer: Ralph L. Smith Lumber Co.

4. Location of Plant Involved: Box 697, Anderson, California.

5. Type of Establishment: Sawmill and Logging operations.

6. Identify Principal Product or Service: Lumber Manufacturing.

7. No. of Workers Employed: 1000 approx.

8. Full Name of Party Filing Charge: Charles R. Hatfield.

9. Address of Party Filing Charge: General Delivery, Lewiston, California.

10. Tel. No.

11. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By CHARLES R. HATFIELD.

June 12, 1955.

GENERAL COUNSEL'S EXHIBIT No. 1-C

United States of America
National Labor Relations Board

FIRST AMENDED CHARGE AGAINST
LABOR ORGANIZATION OR ITS AGENTS

Case No.: 20-CB-408. Date Filed: 8-16-55.

* * * * *

1. Labor Organization or Its Agents Against
Which Charge Is Brought:

Name: International Woodworkers of America,
CIO, Local Union 13-433.

Address: P. O. Box 923, Anderson, California.

The above-named organization or its agents has engaged in and is engaging in unfair labor practices within the meaning of Section (8b) Subsections 1(A) and (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

On or about May 16, 1955, it, by its officers, agents and representatives, attempted to cause, and on or about May 17, 1955, did cause, the Ralph L. Smith Lumber Company at Anderson, California, to discharge Charles R. Hatfield from its employ, although the said Hatfield, on or about May 13, 1955, did tender the periodic dues and initiation fees uniformly required as a condition of acquiring

General Counsel's Exhibit No. 1-C—(Continued)
or retaining membership in the above-named labor organization.

By the above act, and by other acts and conduct, it, by its officers and agents, restrained and coerced employees, and is restraining and coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

3. Name of Employer: Ralph L. Smith Lumber Co.

4. Location of Plant Involved: Box 697, Anderson, California.

5. Type of Establishment: Sawmill and Logging Operations.

6. Identify Principal Product or Service: Lumber Manufacturing.

7. No. of Workers Employed: 1000 approx.

8. Full Name of Party Filing Charge: Charles R. Hatfield.

9. Address of Party Filing Charge: 1753 Placer St., Redding, Calif.

10. Tel No.

11. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By CHARLES R. HATFIELD,
An Individual.

8-14-55.

GENERAL COUNSEL'S EXHIBIT No. 1-E

United States of America
Before the National Labor Relations Board
Twentieth Region

Case No. 20-CB-408

In the Matter of INTERNATIONAL WOOD-
WORKERS OF AMERICA, CIO, LOCAL
UNION 13-433 and CHARLES R. HAT-
FIELD, an Individual,

COMPLAINT

It having been charged by Charles R. Hatfield, an individual, that International Woodworkers of America, CIO, Local Union 13-433, herein called Respondent Union, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C.A. 141, et seq. (Supp. July 1947), herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twentieth Region, designated by the Rules and Regulations of the National Labor Relations Board, Series 6, as amended, Section 102.15, hereby issues this Complaint and alleges as follows:

I.

Ralph L. Smith Lumber Company, herein called the Employer, is a Missouri corporation engaged in manufacturing and selling lumber products with its

General Counsel's Exhibit No. 1-E—(Continued)
principal office located in Anderson, California. It has plants located at Anderson and other points in California. During the year 1954 it sold and shipped from its plants in California lumber and lumber products exceeding \$7,000,000 in value directly to customers located outside the State of California.

II.

Respondent Union is a labor organization within the meaning of Section 2(5) of the Act.

III.

On or about May 17, 1955, and for several months before said date, Charles R. Hatfield was employed by the Employer at its Anderson plant as a choker setter.

IV.

On or about May 16, 1955, Respondent Union attempted to cause, and on or about May 17, 1955, Respondent Union did cause, the Employer to discharge the aforesaid Charles R. Hatfield from its employ, although the said Hatfield on or about May 13, 1955, had tendered the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership in the Respondent Union.

V.

On or about May 17, 1955, the Employer, acting upon the demands of Respondent Union as set forth in paragraph IV, above, discharged the aforesaid Charles R. Hatfield from its employ.

General Counsel's Exhibit No. 1-E—(Continued)

VI.

By the acts set forth in paragraphs IV and V, above, Respondent Union attempted to cause, and did cause, the said Employer to discriminate against Charles R. Hatfield in violation of Section 8(a)(3) of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8(b)(2) of the Act.

VII.

By the acts set forth in paragraph IV, above, Respondent Union did restrain and coerce employees in the exercise of the rights guaranteed them in Section 7 of the Act, and did thereby engage in, and is hereby engaging in, unfair labor practices within the meaning of Section 8(b)(1)(A) of the Act.

VIII.

The acts of Respondent Union set forth in paragraph IV, above, occurring in connection with the operation of Employer described in paragraph I, above, have a close, intimate and substantial relation to trade, traffic, and commerce among the several states and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

IX.

The acts of Respondent Union as set forth in paragraph IV, above, constitute unfair labor practices within the meaning of Section 8(b)(1)(A) and 8(b)(2), and Section 2(6) and (7) of the Act.

General Counsel's Exhibit No. 1-E—(Continued)

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, on this 17th day of August, 1955, issues his Complaint against International Woodworkers of America, CIO, Local Union 13-433, the Respondent named herein.

[Seal] /s/ GERALD A. BROWN,
Regional Director, 20th Region, National Labor
Relations Board.

GENERAL COUNSEL'S EXHIBIT No. 1-J

[Title of Board and Cause.]

ANSWER

Comes now International Woodworkers of America, CIO, Local Union 13-433, and in answer to the Complaint makes the following allegations, admissions and denials:

I.

Admits the allegations contained in Paragraph I of the Complaint.

II.

Admits the allegations contained in Paragraph II of the Complaint.

III.

Admits the allegations contained in Paragraph III of the Complaint and further alleges that Charles R. Hatfield became employed by Ralph L. Smith Lumber Company on October 17, 1954.

General Counsel's Exhibit No. 1-J—(Continued)

IV.

Denies the allegations contained in Paragraph IV of the Complaint except admits that Charles R. Hatfield was discharged by the Employer on or about May 17, 1955.

V.

Denies the allegations contained in Paragraph V of the Complaint.

VI.

Denies the allegations contained in Paragraph VI of the Complaint.

VII.

Denies the allegations contained in Paragraph VII of the Complaint.

VIII.

Denies the allegations contained in Paragraph VIII of the Complaint.

IX.

Denies the allegations contained in Paragraph IX of the Complaint.

Wherefore, Respondent International Woodworkers of America, CIO, Local Union 13-433 prays that the Complaint herein be dismissed.

HALPIN and HALPIN,

/s/ By JACK HALPIN,

Attorneys for Respondent.

Duly Verified.

[Title of Board and Cause.]

INTERMEDIATE REPORT AND RECOMMENDED ORDER

Robert J. Scolnik, Esq., for the General Counsel. Jack Halpin, Esq., for the Respondent. Orr M. Chenoweth, Esq., for Ralph L. Smith Lumber Company.

Before: Howard Myers, Trial Examiner.

Statement of the Case

Upon an amended charge duly filed on August 16, 1955,¹ by Charles R. Hatfield, the General Counsel of the National Labor Relations Board, herein respectively called the General Counsel² and the Board, by the Regional Director for the Twentieth Region (San Francisco, California), issued his complaint, dated August 17, against International Woodworkers of America, Local Union 13-433, affiliated with the Congress of Industrial Organizations, herein called Respondent, and on occasions called the Union, alleging that Respondent had engaged in, and was engaging in, unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2) and Section 2 (6) and (7) of the National Labor Relations Act, 61 Stat. 136, as amended, herein called the Act.

¹ Unless otherwise noted all dates refer to 1955.

² This term specifically includes counsel for the General Counsel appearing at the hearing.

Copies of the amended charge and complaint, together with notice of hearing thereon, were duly served upon Respondent and Hatfield.

With respect to the unfair labor practices, the complaint alleged in substance that on or about May 16, Respondent unlawfully attempted to cause, and on or about May 17, unlawfully caused Hatfield's employer, Ralph L. Smith Lumber Company, herein called the Company, and on occasions called the employer, to discharge Hatfield from its employ thereby causing his employer to discriminate against him in violation of Section 8 (a) (3) of the Act.

On August 25, Respondent duly filed an answer denying the commission of the alleged unfair labor practices.

Pursuant to due notice, a hearing was held on September 28, 29 and 30 at Redding, California, before the undersigned, the duly designated Trial Examiner. The General Counsel and Respondent were represented by counsel and were afforded full opportunity to be heard, to examine and cross examine witnesses, to introduce pertinent evidence, to argue orally at the conclusion of the taking of evidence, and to file briefs and proposed findings of fact and conclusions of law on or before October 20.³ Briefs have been received from the General Counsel and from Respondent's counsel which have been duly considered.

³ At the request of Respondent's counsel, the time to file briefs was extended to and including November 7.

Upon the entire record in the case and from his observations of the witnesses, the undersigned makes the following:

Findings of Fact

I. The business operations of the employer

Ralph L. Smith Lumber Company, a Missouri corporation, has its principal offices and place of business in Anderson, California, where it is engaged in, and during all times material herein was engaged in, manufacturing and selling lumber and lumber products. During 1954, it sold and shipped from its Anderson plant, the employees of which are the only ones concerned in this proceeding, and from its other California plants lumber and lumber products exceeding \$7,000,000 to customers located outside the State of California.

Upon the above undisputed facts the undersigned finds that the employer here involved is engaged in, and during all times material was engaged in, commerce within the meaning of the Act and that it will effectuate the policies of the Act for the Board to assert jurisdiction in this proceeding.

II. The labor organization involved

International Woodworkers of America, Local Union 13-433, affiliated with the Congress of Industrial Organizations, is a labor organization admitting to membership employees of the employer here involved.

III. The unfair labor practices

The question presented is whether Respondent

violated the Act when Ralph L. Smith Lumber Company, Hatfield's employer, bowed to Respondent's insistent demands and discharged Hatfield on May 17, 1955. From the evidence established at the hearing, most of which is not in dispute, the undersigned is convinced, and finds, that, on the authority of the Board's decisions in Aluminum Workers International Union Local No. 135, AFL, (111 NLRB 411 and 112 NLRB No. 80), the question must be resolved against Respondent. The facts upon which this conclusion is based may be summarized as follows:

Under date of October 4, 1950, the Company entered into a contract with Respondent, the certified collective bargaining representative of the Company's production and maintenance employees, including those employed as such in the Company's woods operations. Said contract, as amended from time to time, was in full force and effect during all times relevant to this proceeding and contains a provision requiring, as a condition of employment, that all employees covered must become members within a specific time and thereafter maintain said membership in good standing.

In October, 1954, Hatfield, Paul Thomas, and Walter Spangle were hired by the Company as woods operators and as such were within the unit described in the agreement.

In the latter part of November 1954, Respondent's business agent, Robert P. Crimmins, informed

^{3A} See also Biscuit & Cracker Workers Union, No. 405, 109 NLRB 985, enf. on other grounds, 227 F. 2d 573 (C. A. 2).

Hatfield, Thomas, and Spangle that they had been employed by the Company the prerequisite length of time to make each obliged to join Respondent. After some discussion, Crimmins agreed, solely because the Company was about to shut down its woods operations for the winter, not to insist upon the three employees joining Respondent at that time provided that if, and when, they returned to the Company's employ with the reopening of the operations in the spring, they would join the Union. At the time of the seasonal shutdown (about November 28), Hatfield had been in the Company's employ 42 days (having worked 23 days), Thomas had been employed 40 days (having worked 25 days), and Spangle had been employed 51 days (having worked 34 days).

About mid-March 1955, the woods operations reopened and Hatfield, Thomas, and Spangle were rehired in positions covered by the contract. It was not, however, until May 5, that any one of the three was requested by any Union official to join Respondent. On that day, Ernest Dickey, a vice president of the Union and also its head woods steward, requested Hatfield, Thomas, and Spangle to sign Union membership application cards. The last two named did so. Hatfield, however, refused the card Dickey offered him, stating that he had signed one the previous fall.

When Crimmins arrived at the camp later that day, May 5, Dickey told him of his conversation with Hatfield. Either that evening or the following morning, Crimmins searched the Union's records

and discovered that Hatfield had not applied for membership nor had he paid the required initiation fees or dues.

On May 6, Crimmins again went to the woods and, during a conversation with Herbert Johnson, the Company's woods timekeeper, payroll clerk and keeper of the Company store,¹ stated that he intended to demand Hatfield's discharge because Hatfield had not joined the Union pursuant to the union shop clause of the contract between Respondent and the Company.

Under date of May 6, Crimmins wrote the Company requesting Hatfield's discharge for failure to join the Union. Because of the intervening weekend Crimmins' letter did not arrive at the Company's main offices until May 9, and it was not received by Arthur B. Hood, the Company's vice-president and general manager, to whom the letter was addressed, until May 10, due to Hood's absence from his office.

That evening, May 10, after Hood had told Walter D. Hansen, the logging superintendent, of the contents of Crimmins' letter, Hansen replied, to quote from Hansen's credited testimony, "Well, there is something wrong. I have talked to Mr. Hatfield and Mr. Hatfield expressed to me his willingness to join the union, and also stated that he had believed that he had been signed in, but that if there

¹ The record is clear, and the undersigned finds, that Johnson is, and during all times material was, a non-supervisory employee.

was anything wrong he would certainly like to take care of it.”⁵

The fallers, of which Dickey was one, had quit work early on May 10, and Dickey thereupon went fishing. When he returned to camp that evening he was told by Harvey Watson, the Union's recording secretary for the woods operations, that Hatfield had been looking for him in order “to sign a card to enter the Union.”

At approximately 6:30 on the morning of May 11, shortly before starting time, Hatfield walked into the Company store and asked Johnson to sign him

⁵ Hansen's conversation with Hatfield took place in a Company bus during the May 10 noon hour and in the presence of some 12 or 14 other Company employees. According to Hansen's credited and un-denied testimony the following then took place:

I told Mr. Hatfield that I had heard that his discharge was going to be demanded and there might be some trouble, and I asked him what the situation was. I asked him if he was a conscientious objector to unionism, or joining the union. He said he was not. I suggested that he take care of it. He said, “Well, I am perfectly willing to join the union.” He seemed most cooperative. He wasn't hostile, but he was docile. I turned to members in the bus, crew men in the bus, and I said, in effect, “Here is a good man that wants to join your union. Can't some good union sign him up?” At least one man replied, “There is no job steward here. Jim Gordon is sick. Why doesn't he go to the [Company] camp and see Dickey?” I suggested that he (Hatfield) do that. [Hatfield] told me of his trouble to get to camp. He was riding from Redding with a group of people that didn't normally go to camp to get to work * * * He said he would make every effort to do so.

"into the union." Johnson replied that he had no authority to do so and suggested that he see Dickey. After work that evening, Hatfield returned to the Company store and inquired of Johnson where he could find Dickey. Johnson pointed out the Company house in which Dickey lived. Hatfield went there but Dickey was not at home. Hatfield then returned to the store and asked Charles Holbert, a landing or side rod foreman, to kindly inform Dickey that he had been trying to contact Dickey in order to join the Union.

Crimmins testified, and the undersigned finds, that during the course of a conversation with Hansen on the morning of May 11, the latter told him that he would either have Hatfield join the Union shortly or at least have Hatfield pay the required Union dues; and he replied that in his letter of May 6, he did not enlist the Company's aid in obtaining Hatfield's membership but only requested the Company discharge him.

On the morning of May 12, just prior to the departure of the camp bus for the woods, Hansen told Dickey that Hatfield was anxious to join the Union and therefore he would like "to get the mess" straightened out. Dickey replied that he had no personal objections to Hatfield but the matter was out of his hands and therefore he could not "do anything about it."

While Dickey and Hansen were having the above-related conversation Hatfield entered the Company store and told Johnson that he was desirous of lo-

eating Dickey in order to join the Union. When Johnson informed him that Dickey was entering the bus, Hatfield immediately went to the bus and, according to Dickey's credited and uncontradicted testimony the following ensued between him and Hatfield:

* * * he (Hatfield) came up to the window where I was, and the window was up * * * He tapped on the window and asked did I have them cards for him to sign that morning. Before I could give him an answer, the bus driver drove on * * * However, after we got to the woods * * * Hatfield came up to where I was working and asked me why didn't I have the cards for him to sign. I told him that everything was beyond my control at the time and I couldn't let him sign any cards. We had already had our crew meeting at the camp [the previous] night.⁶

Between the time Hatfield saw Dickey in the bus on May 12, and the time he spoke to him in the woods, as more fully described immediately above, Hatfield returned to the Company store, requested pen and paper of Johnson, and then wrote and signed the following, which he handed to Johnson:

I have offered to join the union as soon as the papers are offered to me to sign I will do so.⁷

⁶ At a meeting of the woods operators held at the camp on the night of May 11, Criminins' action with respect to his demand for Hatfield's discharge was unanimously ratified by the members present.

⁷ The above was erroneously dated May 13.

On the morning of May 13, James M. Gordon, a Union woods job steward who had been hospitalized from May 2 until May 12, came into the Company store to make some purchases. During the conversation Johnson had with him, he apprised Gordon of the Hatfield affair. Johnson then stated that he thought the Union had mishandled the situation. Gordon agreed that the matter had not been handled correctly, and said that, under the circumstances, he "would be willing to sign Hatfield into the union." After Gordon had left, Johnson prepared for Hatfield's signature a letter addressed to the Company, for the attention of Hansen, reading as follows:

Please find enclosed my authorization for the deduction of union dues and initiation fees which have been signed by me this date to be considered as nunc-pro-tunc to 1 November 1954.

You are authorized by me to make the deductions from my pay check in accordance with the enclosed union deduction slip.

When Gordon returned to the store later that morning, Johnson showed him the letter. While they were discussing it, Johnson received a radio call requesting a certain machine part for a caterpillar. Johnson told the caller that he would bring the part and then asked Gordon if he wished to join him. After replying in the affirmative, Gordon suggested that Johnson wait a few minutes until he went to his house⁸ to obtain some Union checkoff

⁸ Gordon lived in a Company house located at the camp.

forms in order to "sign Hatfield into the union."

Gordon and Johnson went to the place where Hatfield was working and gave him the original and a copy of the letter which Johnson had typed. After Gordon and Johnson had explained to Hatfield the purpose and nature of the letter, and after Hatfield had stated that he had endeavored to join the Union on several occasions but no one would sign him up, Gordon prepared a membership application card which Hatfield signed and returned to Gordon. Hatfield then signed the letter Johnson had prepared and several carbon copies thereof. The original was handed to Johnson and one of the signed carbon copies was sent to Respondent. Gordon signed the application card as subscribing witness and after signing the aforesaid letter, placed under his signature, "Job Steward International Woodworkers of America, C.I.O. Local 13-433."

That afternoon, May 13, Hatfield informed Gordon and Johnson that he regretted signing the letter authorizing the Company to remit to the Union dues dating back to November 1, 1954 because he had ascertained that "the others were not paying back dues." After some discussion, Gordon destroyed the letter and prepared a checkoff dues slip normally used by the Union and the Company, which, after Hatfield had signed it, was given to Johnson. Sometime between May 13 and May 15, Johnson noted on the Company's records and upon the original checkoff form a notation that Hatfield's

dues deduction was to begin with the payroll period commencing May 15.⁹

While Crimmins was at the camp on May 14, he was told by Gordon that Hatfield had signed an application card and a checkoff slip. Crimmins, after telling Gordon that he had received a copy of the "nunc-pro-tune" letter, stated that he "wished" that Gordon had not signed up Hatfield. When Gordon offered Hatfield's signed application card to Crimmins, that latter refused it, suggesting that Gordon retain it.¹⁰

Under date of May 16, Crimmins wrote the Company and, after stating that he had received a copy of Hatfield's "nunc-pro-tune" of May 13, again requested that Hatfield be discharged for failure to

⁹ The employees covered by the contract were paid twice a month. The usual procedure, apparently with Respondent's approval, was to make deductions for Union dues, etc., from the second pay period of each month. In cases where employees signed checkoff slips prior to the 15th of the month the deductions were made from their second pay of that month otherwise the deductions were made the following month.

¹⁰ Upon the entire record, including Respondent's Constitution and By-laws, the undersigned finds that Gordon, in his capacity as woods shop steward, was an agent of the Union within the meaning of Section 2 (13) of the Act and therefore his actions and conduct as such representative are attributable to Respondent. *International Longshoremen's and Warehousemen's Union*, 79 NLRB 1487, 1509; *N. L. R. B. v. Acme Mattress Co., Inc.*, 192 F. 2d 524 (C. A. 7); *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 182, etc.*, 111 NLRB 952.

comply with the provisions of the union security clause of the contract. The Company complied with this request and discharged Hatfield on May 17.

Under date of May 20, the Company, at Hatfield's request, sent the Union a check for \$23.50 being payment of Hatfield's initiation fees and his May 1955 dues which amount was deducted from his pay for the period commencing May 15.

Under date of May 23, the Union returned the check with a covering letter stating, in part, that the check could not be accepted because Hatfield was not a member of the Union nor was he eligible to become one.

On July 14, the Company reinstated Hatfield and he worked until he was discharged sometime in August, for failure to report for work as a result of being arrested for disturbing the peace.

Under date of July 21, Frank W. Shuman, Esq., Hatfield's attorney wrote the Union as follows, a copy of which was sent to the Company:

As you know, Mr. Charles R. Hatfield has been reinstated by the Ralph L. Smith Lumber Company as of July 14th, 1955.

Enclosed find my trust fund check in the sum of \$30.50; this sum represents \$20.00 initiation fee for joining the union and dues of \$3.50 per month for the months of April, May and June. It is understood that the succeeding months will be deducted from his pay in the usual manner by Ralph L. Smith Lumber Company and forwarded to you.

If there is any question concerning Mr. Charles R. Hatfield's application to join the union, this let-

ter also constitutes such a request and application for joining same.

On July 27, Respondent's counsel wrote Shuman that the Union was returning his check because it could not accept it since Hatfield was ineligible for membership.

At no time has Respondent questioned the sufficiency of the amount tendered by, or on behalf of, Hatfield, either to Hatfield, to his attorney, or to the Company.

Respondent vigorously contends that the Board in the Aluminum case did not make "good law." It also contends that the Board's pronouncements therein must be narrowly construed otherwise a conflict with them and the Act will necessarily arise since the broad language used by the Board indicates that "a tender of dues no matter when made is good so long as it is made before actual discharge." With these contentions the undersigned can not concur.

Respondent also argues that the facts in the Aluminum case are quite different from those in the instant in that, among things, Hatfield never made a bona fide attempt to join the Union nor did he make a full and unqualified tender of his initiation fees and dues.

It was conceded at the hearing by the General Counsel that a valid union shop was in effect between Respondent and the Company at the time Hatfield was in the latter's employ and that Hat-

field was covered by it; that as of the time the Union first requested his discharge, Hatfield was delinquent in his obligations to the Union since he had been employed by the Company more than 30 days without having tendered the required initiation fee and dues.

The credible evidence establishes, however, that Spangle and Thomas were exactly in the same position as Hatfield at the time each of them signed a membership application card on May 5. As found above, all three men were hired at about the same time in October 1954, and were laid off at about the same time the next month because of the shut down of the Company's woods operations. Shortly before their lay offs, Crimmins agreed, although he knew that Hatfield, Thomas, and Spangle had been in the Company's employ more than 30 days, to waive the immediate payment of the initiation fees and dues of the aforesaid persons provided that they would join the Union if, and when, they were rehired by the Company, upon the reopening of the woods operations the following spring.

The credible evidence further shows that Hatfield, Thomas, and Spangle returned to work about mid-March 1955; that each worked 8 days in March and 12 days in April; that on May 5, at Dickey's solicitation, Thomas and Spangle each signed Union membership application cards; that they also signed checkoff slips which were later turned over to the Company; that when Dickey asked Hatfield on May 5 to sign an application card he told Dickey that he had signed one the previous fall; and that before

Hatfield actually signed an application card and checkoff slip on May 13, he had made several bona fide attempts to join the Union.

The record is manifestly clear, and the undersigned finds, that the parties to the above-mentioned collective bargaining contract administered the collection of dues and initiation fees through a system mutually agreeable, including the various mechanical operations involved. What actually transpired with respect to the administration of the aforesaid system for the first payroll period in May, 1955, as it applied to Hatfield, Thomas, and Spangle was testified to by Johnson and by Warren W. Anderson, the Company's paymaster. According to the latter's uncontradicted and credited testimony, Anderson's department received on May 16 or 17, Johnson's pay sheets for the woods employees including those of Hatfield, Thomas, and Spangle; that the pay sheets of each of the three named persons had entries inserted thereon by Johnson for the deduction of \$23.50 for Union dues and initiation fees; that between May 17 and 20, in the regular course of business, these deductions were entered upon Hatfield's, Thomas', and Spangle's earnings record sheets, upon the Company's payroll journal, and upon said employees' pay check stubs; that under date of May 20, at Hatfield's request, a check for \$23.50 was sent by the Company to the Union in payment of Hatfield's initiation fees and dues; that on May 28, in accordance with the practice acceptable to the Union, the Company sent the Union the regular and customary dues collection

list for the payroll period for the first half of May, which contained notations that \$23.50 had been deducted from the pay of Hatfield, Thomas, and Spangle; that sometime between June 1 and 5, the Company sent the Union a check for the initiation fees and dues checked off for said payroll period, including \$23.50 for Spangle and a like amount for Thomas but excluding any amount for Hatfield because of the separate check for \$23.50 previously sent to the Union; and that the dues and initiation fees collection list and the Company's check for initiation fees and dues of all employees who had duly authorized such deductions were accepted by Respondent without question.¹¹

Hatfield's actions in signing a membership application card on May 13, and then handing it to Gordon, an authorized shop steward, clearly establishes that his numerous efforts prior thereto to join the Union were sincere and illustrates a bona fide attempt on his part to comply with the contract's union security provisions. The undersigned so finds. The undersigned further finds that by executing the checkoff slip prepared by Gordon on May 13, which Gordon gave to Johnson, to whom all such slips signed by the woods operators are delivered, Hatfield made a "full and unqualified tender" within the meaning of the doctrine laid down by the Board in the Aluminum case (112 NLRB No. 80). This

¹¹ Most of the 500 plant employees and most of the 60-80 woods operators in the Company's employ in May 1955, had authorized the Company to deduct from their pay the required initiation fees and dues.

finding is especially bolstered by the fact that Article V, of the contract between Respondent and the Company reads in part as follows:

The Company shall honor written assignments of wages to the Union when the assignments are submitted in substantially the following form:

“To Ralph L. Smith Lumber Co., Anderson, Calif.

Dated.....

“Until further notice, I hereby authorize you to deduct from my wages monthly, and to pay to Local Union No. 433, IWA-CIO, Union dues of \$. per month.

.....
Signature of Employee”

Such an assignment may be revoked in writing at any time. Until such an assignment is revoked the Employer shall remit to the Union the dues deducted pursuant to such assignment not less than once each month, with a written statement of the names of the employees for whom the deductions were made and the amount of each deduction.

The Union shall hold the Employer harmless against any claim which may be made by reason of the deduction of Union dues.

Furthermore, the Union posted in conspicuous places about the camp placards calling the employees’ attention to the availability of checkoff slips for both initiation fees and dues and thus it appears that Respondent agreed to accept as a full and un-

qualified tender of initiation fees and dues signed checkoff slips.

Upon the record as a whole, the undersigned is convinced, and finds, that Respondent's actions as epitomized above, in attempting to cause, and actually causing, the Company to unlawfully discharge Hatfield, were violative of Section 8 (b) (1) (A) and (2) of the Act.

IV. The effect of the unfair labor practices upon commerce

The activities of Respondent set forth in Section III above, occurring in connection with the operations of Ralph L. Smith Lumber Company, set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and, such of them as have been found to be unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2) of the Act, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In order to make effective the interdependent guarantee of Section 7, to prevent a recurrence of unfair labor practices and thereby minimize indus-

trial strife which burdens and obstructs commerce and thus effectuate the policies of the Act, the undersigned will recommend that Respondent cease and desist from in any manner infringing upon the rights of the employees or prospective employees of Ralph L. Smith Lumber Company, or of any other employer, guaranteed in Section 7 of the Act.

As it has been found that Respondent, in violation of the Act, caused Ralph L. Smith Lumber Company to discharge Charles R. Hatfield, the undersigned shall recommend that Respondent make him whole for any loss of pay he may have suffered because of the discrimination against him by payment to him of a sum of money equal to the amount he would normally have earned as wages, less his net earnings during the period he was not working full time for Ralph L. Smith Lumber Company from May 17 to July 14, 1955.

Upon the basis of the foregoing findings of fact and upon the entire record in the case, the undersigned makes the following:

Conclusions of Law

1. International Woodworkers of America, Local Union No. 13-433, affiliated with Congress of Industrial Organizations, is a labor organization within the meaning of Section 2 (5) of the Act.

2. Ralph L. Smith Lumber Company, Anderson, California, is an employer within the meaning of Section 2 (2) of the Act and is engaged in commerce within the meaning of Section 2 (6) of the Act.

3. By restraining and coercing employees of the Company in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

4. By causing and attempting to cause the Company, an employer, to discriminate against its employees, in violation of Section 8 (a) (3) of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

Recommendations

Upon the basis of the foregoing findings of fact and conclusions of law, the undersigned recommends that International Woodworkers of America, Local Union No. 13-433, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Attempting to cause and causing Ralph L. Smith Lumber Company, its officers, agents, successors, and assigns, to discharge any of its employees except in accordance with the terms of a valid union-shop contract, or in any other manner attempting to cause said Company, its officers, agents, successors, and assigns, to discriminate against any of its employees in violation of Section 8 (a) (3) of the Act.

(b) Restraining or coercing employees or prospective employees of Ralph L. Smith Lumber Company, or of any other employer, in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post immediately in conspicuous places in business office of International Woodworkers of America, Local Union No. 13-433 at Anderson, California, and in all places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material:

(b) Mail to said Regional Director signed copies of the aforesaid notice for posting, Ralph L. Smith Lumber Company willing, at the Company's woods

operations where notices to its employees are customarily posted;

(c) Make Charles R. Hatfield whole for any loss of wage he may have sustained as the result of the unfair labor practices in the manner set forth in the Section entitled "The remedy";

(d) Notify said Regional Director, in writing, within twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order what steps Respondent has taken to comply herewith;

(e) It is further recommended that unless on or before twenty (20) days from the date of the receipt of this Intermediate Report and Recommended Order Respondent notify the said Regional Director, in writing, that it will comply with the above recommendations, the National Labor Relations Board issue an order requiring it to take the aforesaid action.

Dated this 14th day of December, 1955.

/s/ HOWARD MYERS,
Trial Examiner.

APPENDIX A

Notice to All Members of International Woodworkers of America, Local Union No. 13-433, and to All Employees of Ralph L. Smith Lumber Company. Pursuant to the Recommendations of a Trial Examiner of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act,

we hereby notify our members and the employees of Ralph L. Smith Lumber Company, that:

We Will Not cause or attempt to cause Ralph L. Smith Lumber Company, its officers, agents, successors, or assigns, to discriminate against any employee or prospective employee of said Company, or of any other employer, in violation of Section 8 (a) (3) of the Act.

We Will Not restrain or coerce employees or prospective employees of Ralph L. Smith Lumber Company, its officers, agents, successors, or assigns, or of any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, or in their right to refrain from all or any such concerted activities, except to the extent that such right may be affected by the proviso in Section 8 (b) (1) (A) of the Act, or by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

We will make Charles R. Hatfield whole for any loss of pay suffered because of the discrimination against him.

International Woodworkers of America,
Local Union No. 13-433,
(Labor Organization).

Dated.....

By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

[Title of Board and Cause.]

EXCEPTIONS TO THE INTERMEDIATE REPORT AND RECOMMENDED ORDER

Respondent International Woodworkers of America, CIO, Local Union 13-433 excepts to the following findings of fact, conclusions of law, and recommendations contained in the intermediate report and recommended order in the above entitled case.

I. Excepts to the Following Statement: p. 2, lines 40-50:

“The question presented is whether Respondent violated the Act when Ralph L. Smith Lumber Company, Hatfield’s employer, bowed to Respondent’s insistent demands and discharged Hatfield on May 17, 1955. From the evidence established at the hearing, most of which is not in dispute, the undersigned is convinced, and finds, that, on the authority of the Board’s decision in Aluminum Workers International Union Local No. 135, AFL, (111 NLRB 411 and 112 NLRB No. 80), the question must be resolved against Respondent. The facts upon which this conclusion is based may be summarized as follows:”

II. Excepts to the Following Statement: P. 3, lines 50-60; p. 4, lines 1-2:

“That evening, May 10, after Hood had told Walter D. Hansen, the logging superintendent, of the contents of Crimmins’ letter, Hansen replied,

to quote from Hansen's credited testimony, 'Well, there is something wrong. I have talked to Mr. Hatfield and Mr. Hatfield expressed to me his willingness to join the union, and also stated that he had believed that he had been signed in, but that if there was anything wrong he would certainly like to take care of it.' "

"⁴ The record is clear, and the undersigned finds, that Johnson is, and during all times material was, a non-supervisory employee.

⁵ Hansen's conversation with Hatfield took place in a Company bus during the May 10 noon hour and in the presence of some 12 or 14 other Company employees. According to Hansen's credited and undenied testimony the following then took place:

I told Mr. Hatfield that I had heard that his discharge was going to be demanded and there might be some trouble, and I asked him what the situation was. I asked him if he was a conscientious objector to unionism, or joining the union. He said he was not. I suggested that he take care of it. He said, 'Well, I am perfectly willing to join the union.' He seemed most cooperative. He wasn't hostile, but he was docile. I turned to members in the bus, crew men in the bus, and I said, in effect, 'Here is a good man that wants to join your union. Can't some good union sign him up?' At least one man replied, 'There is no job steward here. Jim Gordon is sick. Why doesn't he go to the (Company) camp and see Dickey?' I

suggested that he (Hatfield) do that. (Hatfield told me of his trouble to get to camp. He was riding from Redding with a group of people that didn't normally go to camp to get to work * * * He said he would make every effort to do so."

III. Excepts to the Following Statement: p. 4, lines 5-10:

"The fallers, of which Dickey was one, had quit work early on May 10, and Dickey thereupon went fishing. When he returned to camp that evening he was told by Harvey Watson, the Union's recording secretary for the woods operations, that Hatfield had been looking for him in order 'to sign a card to enter the union.' "

IV. Excepts to the Following Statement: p. 5, lines 11-20:

"Between the time Hatfield saw Dickey in the bus on May 12, and the time he spoke to him in the woods, as more fully described immediately above, Hatfield returned to the company store, requested pen and paper of Johnson, and then wrote and signed the following, which he handed to Johnson:

I have offered to join the union as soon as the papers are offered to me to sign I will do so."

V. Excepts to the Following Statement: p. 5, lines 44-46:

"After replying in the affirmative, Gordon suggested that Johnson wait a few minutes until he

went to his house^s to obtain some Union checkoff forms in order to 'sign Hatfield into the union.' "

VI. Excepts to the Following Statement: p. 5, lines 47-55; p. 6, lines 1-5:

"Gordon and Johnson went to the place where Hatfield was working and gave him the original and a copy of the letter which Johnson had typed. After Gordon and Johnson had explained to Hatfield the purpose and nature of the letter, and after Hatfield had stated that he had endeavored to join the union on several occasions but no one would sign him up, Gordon prepared a membership application card which Hatfield signed and returned to Gordon. Hatfield then signed the letter Johnson had prepared and several carbon copies thereof. The original was handed to Johnson and one of the signed carbon copies was sent to Respondent. Gordon signed the application card as subscribing witness and after signing the aforesaid letter, placed under his signature, 'Job Steward International Woodworkers of America, C.I.O. Local 13-433.' "

VII. Excepts to the Following Statement: p. 7, lines 25-28:

"At no time has Respondent questioned the sufficiency of the amount tendered by, or on behalf of, Hatfield, either to Hatfield, to his attorney, or to the Company."

^s"Gordon lived in a Company house located at the camp."

VIII. Excepts to the Following Statement: p. 7, lines 31-38:

“Respondent vigorously contends that the Board in the Aluminum case did not make ‘good law.’ It also contends that the Board’s pronouncements therein must be narrowly construed otherwise a conflict with them and the Act will necessarily arise since the broad language used by the Board indicates that ‘A tender of dues no matter when made is good so long as it is made before actual discharge.’ With these contentions the undersigned can not concur.”

IX. Excepts to the Following Statement: p. 7, lines 52-58:

“The credible evidence establishes, however, that Spangle and Thomas were exactly in the same position as Hatfield at the time each of them signed a membership application card on May 5. As found above, all three men were hired at about the same time in October, 1954, and were laid off at about the same time the next month because of the shut down of the company’s woods operations.”

X. Excepts to the Following Statement: p. 8, lines 1-10:

“The credible evidence further shows that Hatfield, Thomas, and Spangle returned to work about mid-March 1955; that each worked 8 days in March and 12 days in April; that on May 5, at Dickey’s solicitation, Thomas and Spangle each signed Union

membership application cards; that they also signed checkoff slips which were later turned over to the company; that when Dickey asked Hatfield on May 5 to sign an application card he told Dickey that he had signed one the previous fall; and that before Hatfield actually signed an application card and checkoff slip on May 13, he had made several bona fide attempts to join the union."

XI. Excepts to the Following Statement: p. 8, lines 41-53; p. 9, lines 1-27:

"Hatfield's actions in signing a membership application card on May 13, and then handing it to Gordon, an authorized shop steward, clearly establishes that his numerous efforts prior thereto to join the union were sincere and illustrates a bona fide attempt on his part to comply with the contract's union security provisions. The undersigned so finds. The undersigned further finds that by executing the checkoff slip prepared by Gordon on May 13, which Gordon gave to Johnson, to whom all such slips signed by the woods operators are delivered, Hatfield made a 'full and unqualified tender' within the meaning of the doctrine laid down by the Board in the Aluminum case (112 NLRB No. 80). This finding is especially bolstered by the fact that Article V, of the contract between Respondent and the Company reads in part as follows:

The company shall honor written assignments of wages to the union when the assignments are submitted in substantially the following form:

To Ralph L. Smith Lumber Co.

Anderson, California

Dated

Until further notice, I hereby authorize you to deduct from my wages monthly, and to pay to Local Union No. 433, IWA-CIO, Union dues of \$. per month.

.....

Signature of Employee

Such an assignment may be revoked in writing at any time. Until such an assignment is revoked the Employer shall remit to the union the dues deducted pursuant to such assignment not less than once each month, with a written statement of the names of the employees for whom the deductions were made and the amount of each deduction.

The union shall hold the employer harmless against any claim which may be made by reason of the deduction of union dues."

XII. Excepts to the Following Statement: p. 9, lines 28-33:

"Furthermore, the union posted in conspicuous places about the camp placards calling the employee's attention to the availability of checkoff slips for both initiation fees and dues and thus it appears that Respondent agreed to accept as a full and unqualified tender of initiation fees and dues signed checkoff slips."

XIII. Excepts to the Following Statement: p. 9, lines 35-39:

“Upon the record as a whole, the undersigned is convinced, and finds, that Respondent’s actions as epitomized above, in attempting to cause, and actually causing, the company to unlawfully discharge Hatfield, were violative of Section 8 (b) (A) and (2) of the Act.”

XIV. Excepts to the Following Statement: p. 9, lines 40-49:

“The activities of Respondent set forth in Section III above, occurring in connection with the operations of Ralph L. Smith Lumber Company, set forth in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several States, and, such of them as have been found to be unfair labor practices, tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.”

XV. Excepts to the Following Statement: p. 9, lines 52-63; p. 10, lines 1-11:

“Having found that Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8 (b) (1) (A) and (2) of the Act, the undersigned will recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In order to make effective the interdependent guarantee of Section 7, to prevent a recurrence of unfair labor practices and thereby minimize industrial strife which burdens and obstructs commerce

and thus effectuate the policies of the Act, the undersigned will recommend that Respondent cease and desist from in any manner infringing upon the rights of the employees or prospective employees of Ralph L. Smith Lumber Company, or of any other employer, guaranteed in Section 7 of the Act.

As it has been found that Respondent, in violation of the Act, caused Ralph L. Smith Lumber Company to discharge Charles R. Hatfield, the undersigned shall recommend that Respondent make him whole for any loss of pay he may have suffered because of the discrimination against him by payment to him of a sum of money equal to the amount he would normally have earned as wages, less his net earnings during the period he was not working full time for Ralph L. Smith Lumber Company from May 17 to July 14, 1955."

XVI. Excepts to the Following Statement: p. 10, lines 26-30:

"By restraining and coercing employees of the company in the exercise of the rights guaranteed in Section 7 of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act."

XVII. Excepts to the Following Statement: p. 10, lines 31-35:

"By causing and attempting to cause the Company, an employer, to discriminate against its employees, in violation of Section 8 (a) (3) of the Act, Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Section 8 (b) (2) of the Act."

XVIII. Excepts to the Following Statement:
p. 10, lines 36-39:

"The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act."

XIX. Excepts to the Following Statement: p. 10, lines 47-62; p. 11, lines 1-40:

[Note: Cease and Desist Order appearing here is the same as set out at pages 32-34 of this printed record.]

Dated: January 20, 1956. Redding, California.

/s/ JACK HALPIN,

Attorney for Respondent, I.W.A., CIO., Local
Union 13-433.

United States of America
Before The National Labor Relations Board

Case No. 20-CB-408

INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO, LOCAL UNION 13-
433, (RALPH L. SMITH LUMBER COM-
PANY, Employer) and CHARLES R. HAT-
FIELD, An Individual.

DECISION AND ORDER

On January 30, 1956, the Board issued an order in this case adopting the findings, conclusions and recommendations of the Intermediate Report of Trial Examiner Howard Myers, no statement of

exceptions to the Report having been timely filed. The Trial Examiner had found that the Respondent's actions in attempting to cause and actually causing the Employer to discharge the charging party, Hatfield, were violative of Sections 8 (b) (1) (A) and 8 (b) (2) of the Act. To remedy the violations found the Board ordered the Respondent to cease and desist from the conduct found to be unlawful and to take certain affirmative action.

On February 7 the Respondent moved that the Board reopen the case on the ground that its delay in filing exceptions was due to other commitments and inefficiency in mimeographing service. The Board on February 13, 1956, denied this motion as lacking in merit.

Thereafter the case was considered by the United States Court of Appeals for the Ninth Circuit upon the Board's petition for summary entry of decree. The Court, on August 6, 1956, remanded the case to the Board with directions to consider the matter on the merits "including the objections of Respondent which are in its office" inasmuch as the said objections (exceptions) had actually arrived in Washington, D. C., on the due date but were undeliverable because the Board's office was closed, and did not by their late delivery interfere with the Board's processing of the case.

In addition to its Exceptions to the Intermediate Report, the Respondent has filed a brief and a supplementary brief in support of its exceptions. Its request for oral argument was denied in the Board's aforesaid order of January 30, 1956.

Pursuant to the Court's remand of this case the Board has now considered the Intermediate Report, the Respondent's exceptions and briefs, and the entire record in the case. It has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board hereby adopts the findings, conclusions and recommendations of the Trial Examiner with the additions noted below. As the Respondent's position is adequately set out in the record, the exceptions and the briefs, we again deny its request for oral argument.

The Trial Examiner based his finding that Hatfield had made a full and unqualified tender of dues before his discharge, hence that the discharge demanded by Respondent was in violation of Section 8 (b) (1) (A) and (2) of the Act, upon the Board's decision in Aluminum Workers International Union (The Metal Ware Corporation), 111 NLRB 411, 112 NLRB 619, which has since been enforced by the United States Court of Appeals for the Seventh Circuit.¹ The Court's opinion makes no specific reference to the Board's construction of the Act that "a full and unqualified tender made any time prior to actual discharge, and without regard as to when the request for discharge may have been made, is a proper tender and a subsequent discharge based upon the request is unlawful." Reference is made by the Court to the

¹ 230 F. 2d 515, 37 LRRM 2640.

obvious good faith of the employee in question and to her having made full tender before "the operative demand" for discharge, language which the Respondent here would construe as indicating a significant change from or rejection of the quoted Board construction of the Act. We do not so construe the Court's opinion. We view the Court's decision as an analysis of the particular facts in the light of the statutory purpose of Section 8 (a) (3) and (b) (1) to bar "free riders," and not as implying that tender is meaningless once a union has effectually, in the circumstances, demanded a discharge.

Since enforcement of the Aluminum Workers Case, we have applied the principle of recognizing a valid tender before actual discharge in a case involving the tender of an initiation fee. See *Technicolor Motion Picture Corporation, et al.*, 115 NLRB 1607.² We there held that causing an employer to discharge an employee after tender of the initiation fee was a violation of Section 8 (b) (1) (A) and (2) of the Act. Frequent demands for discharge had preceded the fee payment and had continued up to the day on which the discharge actually occurred and on which, incidentally, the employee's membership application was accepted by the union. The Respondent contends that the present case is distinguishable from the *Technicolor*

² Member Bean notes his dissent in the *Technicolor Motion Picture Corporation* case, but wishes to state that he considers himself bound by that decision.

case because it never did accept Hatfield's tender of initiation fee and dues, thus refusing to waive late payment. We do not agree. We deem the Technicolor decision controlling. When it became clear on May 10, about the time the first request for discharge was received, that the Respondent would no longer postpone its demand that he join as it had the previous fall, Hatfield made several attempts to sign whatever was necessary for union membership and dues payment. On May 13 a job steward of the union, qualified to take Hatfield's application, did so. But on May 16 the union's business agent, who had already gotten membership approval for the discharge unknown to the job steward, again demanded the discharge on the ground that Hatfield was "ineligible for membership." No contention was made by the Respondent that the tender was insufficient, and, as found by the Trial Examiner, the Respondent had established a practice of accepting signed checkoff slips as a full and unqualified tender of initiation fees and dues. In the circumstances we find that Hatfield could not be deemed a "free rider" from the time on May 13 when he executed the checkoff slip supplied to him by the job steward and handed to the Employer's storekeeper in the customary manner. His discharge thereafter, on May 17, cannot be defended under the union shop agreement.

Having found no merit in the exceptions to the Intermediate Report filed by the Respondent, we shall issue the order recommended therein.

Order

Upon the basis of the above findings of fact and the entire record in the case, and pursuant to Section 10 (c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, International Woodworkers of America, AFL-CIO, Local Union No. 13-433, its officers, representatives, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Attempting to cause and causing Ralph L. Smith Lumber Company, its officers, agents, successors, and assigns, to discharge any of its employees except in accordance with the terms of a valid union-shop contract, or in any other manner attempting to cause said Company, its officers, agents, successors, and assigns, to discriminate against any of its employees in violation of Section 8 (a) (3) of the Act.

(b) Restraining or coercing employees or prospective employees of Ralph L. Smith Lumber Company, or of any other employer, in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post immediately in conspicuous places in business office of International Woodworkers of America, AFL-CIO, Local Union No. 13-433, at Anderson, California, and in all places where notices to its members are customarily posted, copies of the notice attached hereto marked "Appendix A."³ Copies of said notice, to be furnished by the Regional Director for the Twentieth Region, shall, after being duly signed by Respondent, be posted by it immediately upon receipt thereof and be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material;

(b) Mail to said Regional Director signed copies of the aforesaid notice for posting, Ralph L. Smith Lumber Company willing, at the Company's woods operations where notices to its employees are customarily posted;

(c) Make Charles R. Hatfield whole for any loss of wages he may have sustained as the result of the unfair labor practices in the manner set forth

³ In the event this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing An Order."

in the Intermediate Report and Recommended Order in the Section entitled "The remedy";

(d) Notify the Regional Director, in writing, within ten (10) days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C., Feb. 20, 1957.

[Seal] BOYD LEEDOM, Chairman,
 ABE MURDOCK, Member,
 PHILIP RAY RODGERS, Member,
 STEPHEN S. BEAN, Member,
 National Labor Relations Board.

[Note: Appendix is the same as Appendix A set out at pages 34-35 except for the words "Pursuant to a Decision and Order of the National Labor Relations Board.]"

United States of America
Before The National Labor Relations Board

Case No. 20-CB-408

INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO, LOCAL UNION 13-
433 (RALPH L. SMITH LUMBER COM-
PANY, Employer) and CHARLES R. HAT-
FIELD, An Individual.

SUPPLEMENTAL DECISION

On February 20, 1957, the Board entered its Decision and Order in this proceeding¹ in which it

¹ 117 NLRB 405.

found that Respondent Union had violated Section 8 (b) (1) (A) and (2) of the Act by causing the discharge of woods employee Hatfield under its valid union security agreement, at a time when Hatfield had made a full and unqualified tender of initiation fees and dues. In its opinion the Board referred as precedent to its decisions in Aluminum Workers International Union (The Metal Ware Corporation),² and in Technicolor Motion Picture Corporation,³ wherein it held that a full and unqualified tender of dues and initiation fees at any time before actual discharge was a proper tender and a subsequent discharge unlawful. It also referred to the opinion of the United States Court of Appeals for the Seventh Circuit in the Aluminum case.⁴

Since issuance of the Board's Decision and Order in this proceeding, the United States Court of Appeals for the Ninth Circuit has, in the Technicolor case,⁵ denied enforcement and ordered a remand. The Court interprets the union shop proviso to Section 8 (a) (3) of the Act as authorizing the execution of collective bargaining agreements which make time of the essence with regard to the tender of initiation fees within the thirty day

² 111 NLRB 411, 112 NLRB 619.

³ 115 NLRB 1607.

⁴ *N.L.R.B. v. Aluminum Workers International Union, Local No. 135, AFL*, 230 F. 2d 515 (C.A. 7), March 2, 1956, 37 L.R.R.M. 2640.

⁵ *N.L.R.B. v. Technicolor Motion Picture Corporation, et al.*, 248 F. 2d 348. C.A. 9), September 24, 1957, 40 L.R.R.M. 2660.

grace period allowed by the proviso, holding that a belated tender under such an agreement, although made before actual discharge, will not avert a valid discharge—contrary to the Board's view. The Court declined to pass upon the contention that Respondents, in the particular circumstances of that case, were precluded from insisting upon their respective rights under the contract, stating that it would be sound policy for the Board rather than the Court to initiate any theory of waiver or preclusion in this area of the law. Thus the Court, although disagreeing with the Board's interpretation of the basic legal principle involved, recognized that particular cases may require relaxation of the rule.

We have carefully reexamined and reconsidered the entire record in this case in the light of the Technicolor court decision, and with all due respect to that Court, we adhere to our original decision and our interpretation of the Act. Moreover, even assuming that Hatfield's tender was belated, we nevertheless find that the Respondent accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge.

As stated in our earlier decision, Respondent had established a practice of accepting signed check-off slips as a full and unqualified tender of initiation fees and dues, and Hatfield made such a full and unqualified tender to job steward Gordon on May 13, 1955. Gordon accepted it. Respondent contends, however, that its business agent rejected Hatfield's tender, and hence that it did not waive

its contract right to insist upon timely payment. As we have said, we do not agree. Regardless of the fact that Respondent's business agent refused to accept Hatfield's membership application from job steward Gordon, and that he later, upon receiving the Employer's check covering Hatfield's initiation fee and dues pursuant to Hatfield's check-off authorization of the 13th, returned the check to the Employer, Respondent was bound by the actions of Gordon whom it had clearly authorized to sign up new members. Notices posted by Respondent to the lumber company employees concerning obligations under the union security agreement stated in part:

It is essential that new applicants for membership contact the Union Shop Steward in their department, or the Business Agent of the Union, and be prepared to pay the Initiation Fee, which is \$20.00 and \$3.50 for a month's dues. A convenient Check-Off Card is provided for both Initiation Fee and monthly dues for your convenience.

Gordon defined his duty as a job steward as follows: "I am supposed to sign up the new men as they come to work, sign them up into the union."⁶ This testimony was corroborated by Crimmins, the business agent. Furthermore, Respondent's Constitution and By-Laws contains nothing to negate this authority on the part of the job steward. Thus the Trial Examiner's finding (I.R. ftn. 11, 117 NLRB

⁶ Gordon also testified that he had planned to sign up Hatfield and the two others who had not signed up in the fall, on May 3, but was prevented from doing so by his injury on May 2 and his stay in the hospital until May 12.

413) that Gordon as job steward⁷ for the Union was its agent, and that his actions and conduct as steward are attributable to it, is amply supported by the record. In the circumstances, we deem Gordon's acceptance of Hatfield's tender to have constituted acceptance by Respondent. Nor do we see that Gordon's testimony on redirect examination, that he "probably wouldn't have" signed Hatfield up had he known of the discharge letter, alters the effect of his having done so. Gordon was authorized to act for the Respondent in that capacity and he did so in the instance with which we are concerned. On this record we find that Respondent, by the action of its agent Gordon in accepting the checkoff slip for initiation fees and dues tendered by Hatfield, waived its right to insist that Hatfield be discharged for failure to make a prompt tender.

For the reasons hereinabove stated, we affirm our Decision and Order of February 20, 1957, as supplemented herein.

Dated, Washington, D. C., Feb. 24, 1958.

[Seal] BOYD LEEDOM, Chairman,
 PHILIP RAY RODGERS, Member,
 STEPHEN S. BEAN, Member,
 JOSEPH ALTON JENKINS,
 Member,
 National Labor Relations Board.

⁷ The Trial Examiner referred to Gordon as the "woods shop steward"; actually Gordon testified that he was "a job steward" for the Union. In the context it appears that "woods shop" and "job" are synonymous.

United States Court of Appeals
For The Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
vs.

INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO, LOCAL UNION NO.
13-433, Respondent.

CERTIFICATE OF THE NATIONAL
LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.84, Rules and Regulations of the National Labor Relations Board—Series 6, as amended, hereby certifies that the documents annexed hereto constitute a full and accurate transcript of the entire record of a proceeding had before said Board, known as Case No. 20-CB-408. Such transcript includes the pleadings and testimony and evidence upon which the order of the Board in said proceeding was entered and includes also the findings and order of the Board.

Fully enumerated, said documents attached hereto are as follows:

(1) Stenographic transcript of testimony taken before Trial Examiner Howard Myers on September 28, 29, and 30, 1955, together with all exhibits introduced in evidence.

(2) Copy of Trial Examiner Myers' Intermediate Report and Recommended Order issued December 14, 1955.

(3) Order transferring case to the National Labor Relations Board, dated December 14, 1955.

(4) Affidavit of service of Trial Examiner Myers' Intermediate Report and order transferring case to the Board, mailed December 14, 1955, together with United States Post Office return receipts thereof.

(5) Respondent's letter dated December 21, 1955, requesting extension of time to file exceptions.

(6) Copy of Board's telegram, dated December 29, 1955, granting all parties extension of time to January 20, 1956, to file exceptions and briefs.

(7) Respondent's letter dated January 19, 1956, requesting permission to argue orally before the Board. (Denied, See Board's Order dated January 30, 1956, page 1, footnote 2.)

(8) Copy of Board's order, dated January 30, 1956, adopting the findings, conclusions and recommendations of the Trial Examiner as contained in the Intermediate Report, together with affidavit of service and United States Post Office return receipts thereof.

(9) Respondent's motion to reopen case and affidavit in support thereof sworn to February 7, 1956.

(10) Copy of Board's letter, dated February 13, 1956, denying Respondent's motion to reopen case.

(11) Copy of Respondent's exceptions to the Intermediate Report dated January 20, 1956.

(12) Copy of Decision and Order issued by the National Labor Relations Board on February 20, 1957.

(13) Copy of Supplemental Decision issued by the National Labor Relations Board on February 24, 1958.

In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 11th day of July, 1958.

[Seal] FRANK M. KLEILER,
Executive Secretary, National
Labor Relations Board.

[Endorsed]: No. 16089. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Petitioner, vs. International Woodworkers of America, AFL-CIO, Local Union No. 13-433, Respondents. Transcript of Record. Petition For Enforcement of an Order of the National Labor Relations Board.

Filed and Docketed: July 15, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16089

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO, LOCAL UNION NO.
13-433 Respondent.

PETITION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RE-
LATIONS BOARD

To the Honorable, the Judges of the United States
Court of Appeals for the Ninth Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151 et seq.), hereinafter called the Act, respectfully petitions this Court for the enforcement of its order against Respondent, International Woodworkers of America, AFL-CIO, Local Union No. 13-433, its officers, representatives, agents, successors and assigns. The proceeding resulting in said order is known upon the records of the Board as Case No. 20-CB-408. In support of this petition the Board respectfully shows:

- (1) Respondent is a labor organization engaged

in promoting and protecting the interests of its members in the State of California, within this judicial circuit where the unfair labor practices occurred. This Court therefore has jurisdiction of this petition by virtue of Section 10 (e) of the National Labor Relations Act, as amended.

(2) This case was originally brought before the Court by a petition for Summary Entry of a Decree enforcing an Order of the National Labor Relations Board dated January 30, 1956.

(3) This Court on August 6, 1956, after consideration denied the petition and remanded the case to the Board for the purpose of considering the matter on the merits.

(4) Thereafter, pursuant to the remand and upon due proceedings had before the Board in said matter, the Board on February 20, 1957, duly stated its findings of fact and conclusions of law, and issued an Order directed to the Respondent, its officers, representatives, agents, successors and assigns. Thereafter, in view of this Court's decision in *N.L.R.B. v. Technicolor Motion Picture Corporation, et al.*, 248 F. 2d 348 (C. A. 9), September 24, 1957, 50 L.R.R.M. 2660, the Board reconsidered its initial Decision and Order and issued a Supplemental Decision on February 24, 1958. On those respective dates the Board's Decision and Order and Supplemental Decision were served upon Respondent by sending a copy thereof postpaid, bearing Government frank, by registered mail, to Respondent's Counsel.

(5) Pursuant to Section 10 (e) of the National Labor Relations Act, as amended, the Board is certifying and filing with this Court the certified record of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceeding before the Board upon which the said Order was entered, which includes the pleadings, testimony and evidence, findings of fact, conclusions of law and Order of the Board sought to be enforced.

Wherefore, the Board prays this Honorable Court that it cause notice of the filing of this petition and transcript to be served upon Respondent and that this Court take jurisdiction of the proceeding and of the questions determined therein and make and enter upon the pleadings, testimony and evidence, and the proceedings set forth in the transcript and upon the Order made thereupon a decree enforcing in whole said Order of the Board, and requiring Respondent, its officers, representatives, agents, successors and assigns to comply therewith.

Dated at Washington, D. C., this 11th day of July 1958.

/s/ THOMAS J. McDERMOTT,
Associate General Counsel, Na-
tional Labor Relations Board.

[Endorsed]: Filed July 15, 1958. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH PETITIONER INTENDS TO RELY

In this proceeding, petitioner, the National Labor Relations Board will urge and rely upon the following points:

1. The Board properly found that when Union steward Gordon accepted employee Hatfield's tender of initiation fee and dues on May 13, 1955, the Union waived its right thereafter to demand Hatfield's discharge on the ground that the tender was not made within the 30-day grace period provided in the union-security provision of its contract with the Company.

2. A tender of dues and initiation fee by an employee at any time before discharge terminates the right of a union, operating under a valid union-security agreement, to demand his discharge on the ground that the tender was not made within the 30-day period permitted by the proviso to Section 8(a)(3) of the Act.

3. The Board's order was valid and proper.

Dated at Washington, D. C., this 11th day of July, 1958.

/s/ MARCEL MALLET-PREVOST,

Assistant General Counsel, National
Labor Relations Board.

[Endorsed]: Filed July 15, 1958. Paul P. O'Brien,
Clerk.

[Title of Court of Appeals and Cause.]

ANSWER TO PETITION FOR ENFORCE-
MENT OF AN ORDER OF THE NA-
TIONAL LABOR RELATIONS BOARD

The respondent International Woodworkers of America, AFL-CIO, Local Union No. 13-433 respectfully answers the petition filed in this Court by the National Labor Relations Board on July 15, 1958. The respondent alleges as follows:

1.

Admits the allegations of Paragraph 1 of the petition, except denies that respondent committed an unfair labor practice.

2.

Admits the allegations of Paragraph 2 of the petition.

3.

Admits the allegations of Paragraph 3 of the petition.

4.

Admits the allegations of Paragraph 4 of the petition.

5.

Admits the allegations of Paragraph 5, except denies that the complete record has been filed with this Court and in this connection alleges that on June 30, 1958, prior to the time the petition was filed in this Court, respondent filed a motion to re-open the case before the petitioner, National Labor

Relations Board. That said motion together with the Board's order denying said motion has not been certified to this Court as part of the record.

Wherefore, the petitioner prays that this Honorable Court order petitioner to certify the complete record to the Court in accordance with Rule 34 (8) of the Rules of Practice of United States Court of Appeals for the Ninth Circuit before taking jurisdiction of the proceedings and that upon a consideration of the entire record, this honorable Court deny the petition of the petitioner.

Dated at Redding, Calif., this 29th day of July, 1958.

HALPIN and HALPIN,
/s/ By JACK HALPIN,
Attorneys for Petitioner.

[Endorsed]: Filed July 30, 1958. Paul P. O'Brien, Clark.

[Title of Court of Appeals and Cause.]

STATEMENT OF POINTS ON WHICH RESPONDENT INTENDS TO RELY

1. The Board made its finding that the Union waived its right to prompt payment of the initiation fee and dues without presenting this issue in its complaint, charge or at the hearing. It unlawfully refused the Union an opportunity to present evidence on this issue.

2. The tender of dues after the 30 day period of

grace provided by Section 8a (3) of the act is not compliance with the act and the failure to accept the tender is not an unfair labor practice.

3. The Board was not valid.

Dated at Redding, Calif., July 29, 1958.

HALPIN and HALPIN,
/s/ By JACK HALPIN,
Attorneys for Respondent.

[Endorsed]: Filed July 30, 1958. Paul P. O'Brien, Clerk.

Before the National Labor Relations Board
Twentieth Region

Case No. 20-CB-408

In the Matter of: INTERNATIONAL WOOD-
WORKERS OF AMERICA, CIO, LOCAL
UNION 13-433 and CHARLES R. HAT-
FIELD, an Individual.

TRANSCRIPT OF PROCEEDINGS

Court Room—County Courthouse,
Redding, California,

Wednesday, September 28, 1955

Pursuant to notice, the above-entitled matter came on for hearing at 10:00 o'clock, a.m.

Before: Howard Myers, Trial Examiner.

Appearances: Robert J. Scolnik, 630 Sansome Street, San Francisco, California, appearing on be-

half of the General Counsel, National Labor Relations Board. Jack Halpin, 1428 West Street, Redding, California, appearing on behalf of International Woodworkers of America, CIO, Local Union 13-433, Respondent. Orr M. Chenoweth, 1525 Pine Street, Redding, California, appearing on behalf of Ralph L. Smith Lumber Company. [1]*

* * * * *

Mr. Scolnik: As General Counsel's Exhibit No. 2, I will ask the reporter to mark for identification a mimeographed document in booklet form, which I understand counsel for the respondent will stipulate is the collective bargaining agreement between the respondent union and the Ralph L. Smith Lumber Company, named in the complaint; and, further, that said collective bargaining agreement was in effect at all times material to this proceeding; and, further, that for the purposes of this proceeding only that the said agreement has been in effect continuously from on or about October 4, 1950 to the present date.

Mr. Halpin: I am willing to stipulate to that.

Trial Examiner: And do you stipulate, Mr. Scolnik?

Mr. Scolnik: I so stipulate. [9]

* * * * *

ARTHUR BRISTOW HOOD

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Arthur Bristow Hood.

* * * * *

Direct Examination

Q. (By Mr. Scolnik): Would you kindly state for the record your connection, official capacity in connection with the Ralph L. Smith Lumber Company?

A. I am Vice President and General Manager.

* * * * * [13]

Q. (By Mr. Scolnik): I now hand you for your examination General Counsel's Exhibit No. 4 for identification. Would you please examine the document carefully and indicate whether or not you can identify it?

A. Yes, I can identify it.

Q. Would you please do so?

A. I identify this as a letter that was received by our office, directed to me, received on and opened on May 9, Monday. [14]

* * * * *

Q. Can you state to the best of your recollection when you actually received that letter?

A. I cannot state when I first saw the letter. I had been away from the office a good deal. In the previous week I had been to Sacramento on busi-

(Testimony of Arthur Bristow Hood.)

ness and the 9th and 10th of May I was up at our Wildwood Mill.

Q. Where is that located?

A. 57 miles south and west of Anderson. We were building a sizeable mill up there.

Q. Anderson is a town located approximately 12 miles south of Redding?

A. That is right. During that time of my absence my mail accumulated and I do not know the exact first time that I saw this, but it was subsequent to May 9th because the mail was not distributed until after I had left for Wildwood, I am sure.

I saw it possibly on the 10th or the 11th. The reason that I am sure of that is that——

Trial Examiner: Of May?

The Witness: Of May, yes.

A. (Continuing): ——is because this memo in Mr. Smith's [15] handwriting, shows that I passed it over to him on the 12th.

Prior to this time I talked to Walter Hansen, our logging superintendent, at night after I had gotten in. Whether or not that was the 10th or the 11th, I am not sure. [16]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Halpin): Now, prior to the time you handed it to Mr. Smith you definitely do recall talking to Mr. Hansen, is that right? A. Yes.

Q. Do you recall what you told Mr. Hansen pursuant to this letter?

A. I can't recall exactly what I said to him, but

(Testimony of Arthur Bristow Hood.)

I know that I told him that we had received a letter, that it asked for the [21] discharge of Hatfield, and that I would like to have him check up on it and let me know what action had been taken by the union.

Q. Did you instruct Mr. Hansen to discharge Mr. Hatfield? A. No.

Q. Did you tell him not to discharge him?

A. No.

Q. You just communicated the contents of the letter, is that all you did?

A. That is right, asking him to inform Hatfield of the action of the union, which is customary when a complaint comes up.

Q. You asked Mr. Hansen to inform Hatfield of the contents of the letter?

A. Yes; that is right.

Q. Without telling Mr. Hansen to discharge Mr. Hatfield? A. That is right. [22]

* * * * *

Mr. Scolnik: I will now ask the reporter to mark for identification, as General Counsel's Exhibits 5, 6, 7 and 8, typewritten carbons of one page each of documents purporting to be correspondence between the respondent union and the company, and which I will further identify as follows:

General Counsel's Exhibit No. 5, purporting to be a letter dated May 16, 1955, addressed to Mr. Hood, and signed by Mr. Crimmins. [24]

General Counsel's Exhibit No. 6, purporting to be

a letter dated May 17, 1955, addressed to Mr. Crimmins and signed by Mr. Hood.

General Counsel's Exhibit No. 7, purporting to be a letter dated May 20, 1955, addressed to Mr. Crimmins and signed by Mr. R. W. Mason, Secretary-Treasurer, Ralph L. Smith Lumber Company.

And General Counsel's Exhibit No. 8, purporting to be a letter dated May 23, 1955, addressed to the said Mr. Mason, signed by Mr. Crimmins.

(Thereupon the letters above referred to were marked General Counsel's Exhibits Nos. 5, 6, 7 and 8 respectively for identification.)

Mr. Scolnik: It is my understanding, based on prior conversations with the counsel, that he will stipulate that the originals of these documents described by me were signed by the persons that I have indicated and were sent on or about the dates indicated, and duly received by the addressees.

Is that substantially correct, Mr. Halpin?

Mr. Halpin: Yes. I will stipulate to all of that.

Trial Examiner: Very well.

Do you so stipulate, Mr. Scolnik?

Mr. Scolnik: I so stipulate.

Trial Examiner: Do you offer the papers in evidence?

Mr. Scolnik: I am offering in evidence now, in the form of carbon copies, two copies of each, one for the original and [25] one for the duplicate exhibit file, of General Counsel's Exhibits 5, 6, 7 and 8, as heretofore described.

Trial Examiner: Any objection to the papers going in evidence?

Mr. Halpin: There is no objection to them going into evidence, with the reservation that we admit none of the facts contained in the letters. I would like to see the originals.

Trial Examiner: You are not offering them to prove that the statements contained in there are true?

Mr. Scolnik: No, just that the letters were sent and they speak for themselves. [26]

* * * * *

HERBERT JOHNSTON

called as a witness on behalf of the General Counsel, National Labor Relations Board, having been first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Herbert Johnston.

Trial Examiner: Will you kindly spell your last name for the reporter?

The Witness: J-o-h-n-s-t-o-n.

Trial Examiner: Where do you live, Mr. Johnston?

The Witness: Anderson.

Trial Examiner: You may be seated.

Mr. Scolnik, you may proceed with the examination of Mr. Johnston, he having been duly sworn.

Direct Examination

Q. (By Mr. Scolnik): Mr. Johnston, you are employed by the Ralph L. Smith Lumber Company? A. Yes.

Q. How long have you been employed by that

(Testimony of Herbert Johnston.)

company? A. Approximately four years.

Q. What is your position with the company?

A. Timekeeper in the woods.

Q. How long have you held that particular job?

A. Approximately four years.

Q. Was that your job during May of this year?

A. Yes.

Q. Where is your office, or what serves as your office?

A. Seven miles east of Oak Run in the logging camp.

Q. Would you describe what your duties consist of?

A. Well, I make up the pay roll for the employees employed in the woods. I run a company owned store, I haul the garbage now and then—just a little of everything.

Q. How many employees are there in the woods that you make up the pay roll for?

A. At the present time there are approximately 100.

Q. Did your job consist of the same things in May of this year? A. Yes, it did.

Q. Approximately how many employees were in the woods at that time?

A. I can't tell you accurately. We were just starting our logging season. We weren't at full strength. I would estimate about between 60 and 70 men at that time.

Q. Do you live out at the camp?

A. Yes. I have a house at the camp, a company

(Testimony of Herbert Johnston.)

owned house that I live in. Just recently I have been driving back and forth. When inclement weather comes along I will remain in camp due to the fact that I have to be there to let my boss know early in the morning what is going on, whether it is raining or snowing, and the weather condition. [28]

Q. In connection with your taking care of the pay roll of the woods employees, do you maintain certain books and records? A. Yes.

Q. Do you perform any duties with respect to the check off system? A. Yes, I do.

Trial Examiner: You mean the union dues check off?

Mr. Scolnik: Yes.

Q. (By Mr. Scolnik): Are you familiar with the union shop and check off provisions in the contract between the company and the union?

A. Yes, I am.

Q. Do you know Mr. Crimmins, the Business Agent for the union in this case?

A. Yes, I do.

Trial Examiner: Are you a member of the union?

The Witness: No, sir.

Q. (By Mr. Scolnik): Do you know Mr. Hatfield? A. Yes.

Q. Do you have any employees working under you whom you supervise? A. No.

Q. Who is your immediate superior?

A. Walter Hansen.

Q. What is his position with the company? [29]

(Testimony of Herbert Johnston.)

A. He is a logging superintendent.

Q. Does he have authority over the woods employees? A. Yes, he has.

Q. Directing your attention to the spring of this year, I will ask you whether or not you have had any conversations concerning the status of Mr. Hatfield in the union with Mr. Crimmins?

A. Yes, I have.

Q. Have you had more than one such conversation?

A. We, more than once, have discussed Hatfield, yes.

Q. To the best of your recollection, would you state approximately when the first such conversation occurred? A. On the 6th of May.

Q. This year? A. This year, yes.

Q. Can you describe where that took place?

A. In our camp office.

Q. That is your office? A. Yes.

Q. Was anybody present during that conversation, other than Crimmins and yourself?

A. Yes, there were.

Q. Can you name them?

A. Ralph Hammers, shop foreman in the woods.

Q. Would you relate to the best of your recollection what was [30] said during that conversation, identifying who said what?

A. Bob Crimmins came to the office and asked me what the most rapid method was to get a letter to Walter Hansen. I told Bob that the best way to get a letter to Walt would be to put it right there

(Testimony of Herbert Johnston.)

in his box in the office inasmuch as Walt sometimes was there and sometimes he isn't. He is pretty busy and hard to catch.

Bob said he was going to demand that Hatfield be discharged and wanted to know if I had a typewriter. I told him I did have, and that he was welcome to use it. He declined the offer and said he felt his letter should be on a union letterhead.

We discussed the situation there. He told me what he felt, that Hatfield had been giving him the run around and hadn't signed into the union, and that under the provisions of the contract he had a perfect right to demand his dismissal and was going to do so.

Q. Do you recall any other conversation there?

A. Yes. I asked Bob if he had talked to him and he said he had.

Trial Examiner: Talked to whom?

The Witness: To Hatfield.

A. (Continuing): Bob said that he was being called a son-of-a-bitch and he might as well act like one.

I suggested maybe he ought to turn his other cheek and Bob said he had run out of cheeks to turn for that particular man. [31]

That pretty well terminated the conversation with regard to Hatfield. We may have discussed something else at that time, but I don't recall. That pretty well terminated that conversation.

Q. (By Mr. Scolnik): Do you recall approximately when the next conversation between you and

(Testimony of Herbert Johnston.)

Crimmins occurred in which Hatfield was discussed?

A. Well, I don't know exactly when. I do know that we discussed it after that. I don't recall exactly when.

Q. Approximately how long after that, or can you connect it up with any other event in terms of it being before or after or about that time?

A. Well, I do know I talked to him after May 13, within a matter of a few days afterwards. I don't know exactly how long, but it wasn't very long.

Q. Where did that take place?

A. Out there in the camp office.

Q. That is in your office? A. Yes.

Q. Can you recall the time of day, what part of the day that took place?

A. Not definitely. Bob comes up in the afternoon. I can't recall if it was morning or afternoon at that particular time, but he and I, well, normally any discussion we have ever had has normally been in the afternoon. [32]

Q. Were there any other persons present during this conversation?

A. Yes. Ralph Hammers was present on another conversation I had with Bob.

Q. This is the conversation that, according to your recollection, took place shortly after the 13th, is that right? That is the one I am directing your attention to now. A. Yes.

(Testimony of Herbert Johnston.)

Q. You say Mr. Hammers was present at that time? A. Yes.

Q. Anyone else?

A. No. Someone else may have walked in and walked out, I don't recall, but no one else was present during the conversation.

Trial Examiner: Who did you say was present?

The Witness: Ralph Hammers, the shop foreman.

Q. (By Mr. Scolnik): To the best of your recollection, would you relate what was said during this conversation, identifying who said what?

A. In the discussion Bob said something about Walt Hansen writing letters to himself in relation to a letter. Prior to this conversation with Bob I had heard that he had never talked to Hatfield. [33]

* * * * *

A. During the course of the conversation I asked Bob Crimmins if he had talked to Hatfield and his reply was "No."

Trial Examiner: Is that all that was said?

The Witness: We may have discussed other things.

Trial Examiner: I mean about Hatfield?

The Witness: Yes, to the best of my recollection, that was about it. [34]

* * * * *

Q. (By Mr. Scolnik): Directing your attention to Mr. Hatfield, have you had any conversation with Mr. Hatfield himself in connection with his union status during the spring of this year?

(Testimony of Herbert Johnston.)

A. Yes.

Q. Have you had more than one such conversations? A. Yes, I have.

Q. Can you tell approximately when the first time was you talked with Mr. Hatfield about this?

A. Yes. It was approximately the 11th of May in the morning.

Q. Where did that take place?

A. In the camp office.

Q. Was anyone else present at that time?

A. Yes.

Q. Can you identify any of those people?

A. Not by name. The commissary was full, the office was full, when he came in. I didn't pay any attention. I was quite busy at that time in the morning.

Q. What time was it? A. 6:30. [38]

Q. Now, would you relate to the best of your recollection what you said and what Mr. Hatfield said at that time?

A. Hatfield came in and asked me to sign him into the union, and I told Hatfield that I wasn't authorized to sign him into the union, that he would have to see a job steward to accomplish that. I did refer him to Ernest Dickey.

Q. Who is Ernest Dickey?

A. He is the chairman of the sub-local, I believe, there in the woods and the job steward.

Q. Do you know what other job stewards, if any, were out there at that particular time during the month of May, 1955?

(Testimony of Herbert Johnston.)

Trial Examiner: In the woods?

Mr. Scolnik: In the woods.

A. This was in what month?

Q. (By Mr. Scolnik): May, 1955.

A. There was Tony Kusi, Ernest Dickey, Harvey Watson——

Trial Examiner: W-a-t-s-o-n?

The Witness: Yes, sir.

A. (Continuing): ——James Gordon who, at that time, was not there. He was in the hospital due to an industrial injury.

Trial Examiner: G-o-r-d-o-n?

The Witness: Yes.

Q. (By Mr. Scolnik): “At that particular time,” do you mean the whole month of May or May 11th?

A. The morning of May 11th is what I am talking about. [39]

Q. In the course of your duties, job duties, did you and have you had contact with any of the job stewards in the woods? A. Yes.

Q. Could you describe briefly what the nature of the contact that you had with job stewards was?

A. The most frequent contact is the job steward turning in the check off of dues authorized by the particular man involved to take the money from his pay check.

Q. What is the form of this check off of dues that you are referring to?

A. I don't know the wording. They have a form for that.

(Testimony of Herbert Johnston.)

Q. Is it a document of some kind?

A. It is a document, yes, a signed document.

Q. Can you name any particular job stewards who have turned in such documents to you within the last year?

A. Yes. Ernest Dickey has, and so has James Gordon and Hugh White. There may have been others that I can't think of right offhand. Also Harvey Watson.

Q. Now, you have related to us the conversation between you and Hatfield on the morning of May 11th. Have you finished relating that particular conversation? A. Yes.

Q. When was the next time you had a conversation with Hatfield?

A. That evening after work.

Q. Where did this take place? [40]

A. In the camp office.

Trial Examiner: Was this the evening of about May 11th?

The Witness: About May 11th, yes.

Q. (By Mr. Seolnik): Approximately what time was that?

A. Approximately 6:00 o'clock, I would say.

Trial Examiner: Was Hatfield working at the time of day you had the conversation with Crimmins, working for the company?

The Witness: Which conversation, sir?

Trial Examiner: Well, the conversation you are about to relate, had he been working that day?

(Testimony of Herbert Johnston.)

The Witness: Hatfield had been working this day, yes.

Trial Examiner: He was still on the job?

The Witness: Yes.

Q. (By Mr. Scolnik): Was anyone present during this particular conversation?

A. For part of it.

Q. Who was that? A. Charles Holbert.

Q. Can you identify him?

A. Charles is foreman on our landing, side rod foreman of operation.

Q. Is this landing in the woods part of the woods operation?

A. Yes, the area in which logs are collected and loaded on to trucks and hauled to the mill.

Q. What was said in this conversation between you and Hatfield, [41] and who said it?

A. He came in after work and——

Trial Examiner: This is who?

A. Hatfield came in the office after work and told me that he wanted to sign into the union, and he wanted to know where he could find Ernest Dickey. Ernest Dickey lived in camp so I took Hatfield out and pointed to the cabin in which Dickey lived and told him that is where he was living.

Q. (By Mr. Scolnik): Where was this cabin situated in relation to your office?

A. 100 feet behind the office. I showed him where Dickey was living.

Then I went back in the office and was talking to

(Testimony of Herbert Johnston.)

Charles Holbert on some subject unrelated to this, and I don't know what it was.

Hatfield returned to the office while Holbert and I were talking and he told me that he had been unable to locate Ernest Dickey. I told him I didn't think he was there, that I thought Dickey had gone fishing.

Hatfield asked Charlie Holbert to tell Ernest Dickey that night at supper that he, Hatfield, had been in to join into the union.

Then that terminated the conversation. Hatfield left and went home.

Q. When did the next conversation between you and Hatfield [42] take place?

A. On the morning following.

Q. Approximately when?

A. About 6:30 in the morning, approximately.

Q. Where? A. In the office.

Q. Was anybody else present?

A. Yes, there were people in there. I don't know who.

Trial Examiner: Present in conversation?

The Witness: In the conversation, no.

Q. (By Mr. Scolnik): What was said at that time, and who said it?

A. Hatfield came in and said, "Where can I find"—or words to this effect—"Dickey? I want to sign up."

So Dickey was out, just getting on the bus, on the crew bus, to go to the job. I told him he was out front and to go and see him. He left the office.

(Testimony of Herbert Johnston.)

That ended the conversation at that particular time.

Shortly after that he came in——

Trial Examiner: Who came in?

A. (Continuing): Hatfield came into the office. I don't recall for sure whether Walt Hansen was with him or not. He did come into the office.

Q. (By Mr. Scolnik): This was shortly afterwards. What do you mean by that? [43]

A. Ten minutes afterwards, approximately, he came in. I don't recall if Walt was with him or not. Anyway, he said he wanted a piece of paper and a pen, which I gave to him, and then I went about my duties in the other room, or in that room possibly too. He wrote out a statement and when I came back, and it had been completed by him, he gave me the statement.

Then he left and got on the bus and went to work.

Q. What did you do with the statement?

A. I read the statement and then I turned it over to Mr. Hansen.

Q. Do you recall what the statement said in substance?

A. In substance it said, "I want to join the union and I will join the union whenever anybody gives me papers to sign to join." In substance that was it. [44]

* * * * *

(The documents above referred to, heretofore marked General Counsel's Exhibits Nos. 5, 6,

(Testimony of Herbert Johnston.)

7 and 8 for identification, were received in evidence.)

[See pages 227-232.]

Trial Examiner: Will you take the stand again, Mr. Johnston, please.

Mr. Scolnik: I will ask the reporter to mark for identification, as General Counsel's Exhibit No. 9, a handwritten statement on a Ralph L. Smith Lumber Company letterhead, which I have just shown to Mr. Halpin.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

Q. (By Mr. Scolnik): I show you General Counsel's Exhibit 9 for identification, Mr. Johnston, and ask whether you can identify the document?

A. Yes.

Q. Would you kindly identify that in your own words for us?

A. Well, this is the statement that Hatfield signed the morning I mentioned and gave it to me.

Q. Did you actually see him sign it?

A. No.

Q. But he personally gave it to you, is that correct, he personally handed it to you?

A. He personally handed it to me, yes. [46]

Q. I note that there is a notation at the lower left-hand corner in ink on the document. Is that in your handwriting? A. No.

Q. Do you know whose handwriting that is?

(Testimony of Herbert Johnston.)

A. It didn't appear on there. I think possibly it is Del Smith's, but I don't know.

Q. Was that on there when you got it?

A. No.

Q. I note that there is a further notation at the top right in ink, in handwriting which says "Mr. A. B. Hood." Was that on the document when you received it? A. No, it wasn't.

Q. Do you know whose handwriting that is?

A. No, I don't.

Q. I further note that the date appearing at the top right-hand portion of the document is 5-13-1955. I understand that your testimony is that this happened on the morning of the 12th. Is that still your recollection?

A. My recollection is I think I am correct. I think it was the 12th.

Q. Do you have any explanation as to how or why the date appearing on there is May 13?

A. The only explanation I would offer is that he probably wrote the wrong date down.

Q. What did you do with this document after receiving it? [47]

A. I read it and referred it to Walt Hansen.

Q. You gave it to Walter Hansen?

A. Yes.

Q. When? A. The same morning.

Mr. Scolnik: I will offer General Counsel's Exhibit No. 9 in evidence.

Trial Examiner: Any objection?

Mr. Halpin: Yes, there is, Mr. Hearing Officer.

(Testimony of Herbert Johnston.)

The contents of this is clearly a statement of Mr. Hatfield's intention to join the union and he is not here. He has been subpoenaed and we haven't been able to locate him. I don't see what possible relevance it can have except for the purpose of proving that he offered to join the union. For that purpose it is irrelevant.

Trial Examiner: So far the record shows that this is a paper which Hatfield handed the witness.

Under the circumstances I will overrule the objection and receive the paper in evidence, and ask the reporter to kindly mark it as General Counsel's Exhibit No. 9.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 9 for identification, was received in evidence.)

[See page 233.]

Mr. Scolnik: May I obtain permission from the Examiner—counsel has already consented—to withdraw the original and [48] supply in its stead a photostatic copy, which I have already shown counsel?

Trial Examiner: Any objection?

Mr. Halpin: No objection to that.

Trial Examiner: The substitution is permitted.

Mr. Halpin: We still reserve our objection to the introduction of it.

Trial Examiner: Sure.

Mr. Scolnik: I am also offering a second photostatic copy for the duplicate exhibit file, and I will

(Testimony of Herbert Johnston.)

A. It didn't appear on there. I think possibly it is Del Smith's, but I don't know.

Q. Was that on there when you got it?

A. No.

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Q. You gave it to Walter Hansen?

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Mr. Halpin: We still reserve our objection to the introduction of it.

Trial Examiner: Sure.

Mr. Scolnik: I am also offering a second photostatic copy for the duplicate exhibit file, and I will

(Testimony of Herbert Johnston.)

obtain additional photostatic copies and provide counsel with copies.

Q. (By Mr. Scolnik): Have you completed, Mr. Johnston, relating the conversation which, according to your recollection, took place the morning of May 12th? A. Yes, I believe I have.

Trial Examiner: Was Hatfield present when you handed that paper to Mr. Hansen, which paper has been received in evidence as General Counsel's Exhibit 9?

The Witness: No, sir.

Trial Examiner: When did you hand it to Mr. Hansen?

The Witness: I would say about 8:30 or 9:00 o'clock.

Trial Examiner: What time did you get it from Hatfield?

The Witness: 6:30 or a quarter of 7:00.

Q. (By Mr. Scolnik): Now, I will ask you, Mr. Johnston, or will direct your attention to the next conversation you had [49] with Mr. Hatfield and tell us when that occurred?

A. The next conversation was on the 13th.

Q. Approximately when and where did this occur?

A. The conversation took place at the woods landing, near the woods landing, sometime in the morning. I don't know what time exactly it took place.

Q. Were there certain events or incidents which

(Testimony of Herbert Johnston.)

occurred prior to this time which led up to that conversation? A. Yes.

Q. Would you relate what those incidents were, exactly what happened, when and where it happened, to the best of your recollection, and who was involved?

A. James Gordon, who had been in the hospital due to an industrial injury, returned home. He came into my office and I discussed the Hatfield event, or the events of the Hatfield case which had occurred, with him.

Q. When did this happen?

A. On the morning of the 13th.

Q. Do you know approximately when?

A. You mean the time?

Q. Yes.

A. I would say probably 8:00 or 8:30 in the morning he came in and we discussed the Hatfield case.

Do you want the conversation?

Q. Yes. [50]

A. I explained to him what I felt had been done on the Hatfield case, how it had been handled. I told him I didn't think it had been handled properly. Gordon agreed with me and said that under the circumstances he would be willing to sign Hatfield into the union. We talked a little about it, but I don't recall the details. I think Gordon came down for some bacon, or something for breakfast and he returned home. After he returned home I

(Testimony of Herbert Johnston.)

thought a little more about it, and I sat down and typed out a letter. After I had completed that——

Q. You typed up a letter? A. Yes.

Mr. Scolnik: I will ask the reporter to mark for identification, as General Counsel's Exhibit No. 10, a single page document purporting to be a letter, and containing a signature, handwritten signature in ink.

(Thereupon the letter above referred to was marked General Counsel's Exhibit No. 10 for identification.)

Q. (By Mr. Scolnik): I show you General Counsel's Exhibit No. 10 for identification and ask you whether or not you can identify that as the letter which you have just referred to in your testimony?

A. Yes. That is the letter.

Q. Will you tell us what happened after you typed that up?

A. After I typed the letter, Gordon came back in the office [51] and I showed him the letter. We discussed it. I felt that possibly, in connection with the case as it had occurred up to date, it might possibly facilitate Hatfield to become a member of the union.

We were engaged in conversation when Bob Jones, who was the welder-mechanic in our woods, called in on the radio and requested that I see to it that he got a trunnion cap for a D-8 "Cat", a "Cat" part for the caterpillar, so I told him I would bring it up. I asked Gordon if he felt like riding along.

(Testimony of Herbert Johnston.)

He had had a hernia operation. I didn't know if it would jolt him too much. It was pretty rough country. He said if I took it easy he would probably do all right. He said if I would wait a few minutes he would go home and get some check off forms and sign Hatfield into the union.

Q. What is the check off you refer to?

A. The union authorization check off authorizing the money to be deducted from the man's pay check and paid to the union.

Trial Examiner: Union dues?

The Witness: Yes, sir.

Q. (By Mr. Scolnik): What did Gordon do?

A. He went home and got his check off book and we drove to the landing.

Q. Returning for a moment to General's Counsel's Exhibit 10 for identification, was all of the typewritten matter on the document typed by you?

A. Yes.

Q. Did you make any carbon copies at the time you typed the original? A. Yes, I did.

Q. Do you recall how many carbon copies you made? A. Three or four.

Q. Did anybody at all instruct you to type that letter? A. No.

Q. Did anybody at all suggest the contents of the letter? A. No.

Q. Did you and Gordon go up to the landing?

A. Yes.

(Testimony of Herbert Johnston.)

Q. Did you take the original and the carbon copies of the letter with you? A. Yes, sir.

Q. And Gordon took his check off book with him? A. Yes.

Q. And then what happened?

A. When we got to the landing, I believe Gordon said that he didn't want to call Hatfield from the job inasmuch as it was in violation of the contract. So I spoke to the foreman and asked him if it would be all right if we talked to Hatfield for a few minutes. He told us to go ahead.

We gave Hatfield the original of this letter, and a copy, and Gordon talked to him, and I talked to him, explaining as [53] best we could what it was and asked him——

Trial Examiner: Tell us what was said.

A. (Continuing) The best I recall, I asked him if he wanted to join the union.

Trial Examiner: Was Gordon with you?

The Witness: Yes.

A. (Continuing) Hatfield said "Yes," but that no one would sign him into the union. I told him that Jim Gordon was with me and he was the job steward and he would sign him into it, or had stated to me that he would sign him into the union.

I asked him if he wanted to sign in. He said "Sure." So I climbed in back of the pickup and Jim Gordon wrote out the union deduction slip, and the membership card, offered them to Hatfield to sign them, in addition to signing these, the original letter plus the copies.

(Testimony of Herbert Johnston.)

Q. (By Mr. Scolnik): Referring again to General Counsel's Exhibit 10 for identification, did Hatfield sign that document in your presence?

A. Yes, he did.

Q. Did Gordon sign it in your presence?

A. Yes.

Q. Who gave it to you?

A. Well, they both signed it. I don't remember which one signed first, but the last one to sign handed it to me. I don't recall which one it was offhand. [54]

Q. What did you do with it?

A. I took it—at the same time they handed me the check off slip and I took the letter and the check off slip back to the office.

Mr. Scolnik: I will ask the reporter to——

Trial Examiner: Did you see Hatfield sign the check off slip?

The Witness: Yes, sir.

Trial Examiner: You saw him sign it that morning?

The Witness: Yes, sir.

Trial Examiner: Was this letter, identified as General Counsel's Exhibit No. 10, written by you and signed by the parties on the date it bears?

The Witness: Yes, sir.

Trial Examiner: When did Gordon return to work, when did he go back on the pay roll?

The Witness: He went back—I would have to look it up.

Trial Examiner: Was it after this date?

(Testimony of Herbert Johnston.)

The Witness: After this date, sometime in the latter part of May. I don't recall the date.

Mr. Scolnik: I will ask the reporter to mark for identification, as General Counsel's Exhibit No. 11, a small white printed form with handwritten ink notations on it.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 11 for identification.) [55]

Q. (By Mr. Scolnik): I hand you General Counsel's Exhibit No. 12 for identification and ask whether you can identify that?

Trial Examiner: No. 11, isn't it?

Mr. Scolnik: Yes.

Trial Examiner: You said "12".

Mr. Scolnik: Let the record be corrected. I should have referred to General Counsel's Exhibit 11.

Q. (By Mr. Scolnik): Can you identify General Counsel's Exhibit No. 11, Mr. Johnston, as the white check off slip which you have just referred to in your testimony? A. No.

Q. What can you identify that slip as?

A. I can identify it, yes.

Q. Tell us what General Counsel's Exhibit 11 is to the best of your recollection?

A. This is a check off slip authorization and union dues to be paid to the union by Mr. Hatfield.

Q. Was General Counsel's Exhibit 11 signed by Hatfield in your presence? A. Yes, it was.

(Testimony of Herbert Johnston.)

Q. You saw him sign it? A. Yes.

Q. Was it signed on the date that is indicated at the top, May 13? [56] A. Yes.

Q. What were the circumstances under which that was done?

A. He had, Charles Hatfield had originally signed another authorization for deduction. On that authorization it was not the same as this. It had some back months filled in. Hatfield came to the office on the afternoon of the 13th——

Q. What office are you referring to?

A. To the camp office—on the afternoon of the 13th and he said he was sorry he had signed it, that he didn't want to sign the original one that he had signed; that he was sorry he signed it and didn't want to sign it.

Q. (By Trial Examiner): Let us get this straight. What did he sign and when?

A. He signed this (indicating) on the afternoon of the 13th.

Q. What did he sign on the morning of the 13th?

A. A similar check off slip but worded differently.

Q. Where is the paper that he signed on the morning of the 13th? A. It was destroyed.

Q. By whom? A. By Jim Gordon.

Q. In your presence? A. Yes.

Q. When was it destroyed?

A. It was destroyed on the afternoon of the 13th in the camp [57] office.

(Testimony of Herbert Johnston.)

Q. Was Gordon present at the time that Hatfield executed this paper that you are holding in your hand, General Counsel's Exhibit No. 11?

A. Yes, sir.

Q. It was during this conversation that you were just referring to? A. Yes.

Q. (By Mr. Scolnik): Would you explain the circumstances under which the first check off slip was destroyed, and the second one, General Counsel's Exhibit 11, which you held in your hands, was filled out and signed?

A. After signing the original check off slip, having received it, I took it back to the camp office and filed it. Two or three hours later in the day Hatfield came to the office and said that he was sorry he had signed it.

Trial Examiner: Who was there, just the two of you?

The Witness: I believe Gordon was either there then or he came in a little later. I am not sure when he first arrived.

Hatfield said he was sorry he had signed it inasmuch as it authorized the payment of back dues to the union and he felt that he should not pay back dues inasmuch as others were not paying back dues.

I told Hatfield that it was entirely up to him, that he could revoke it at any time he wanted to. I suggested that [58] the matter lay between he and Jim Gordon.

He was pretty excited——

Trial Examiner: Who was?

(Testimony of Herbert Johnston.)

A. (Continuing) Hatfield. After he cooled down Gordon explained that he could destroy the original and sign up as to his wishes. He then destroyed the original.

Trial Examiner: Who?

A. (Continuing) Gordon destroyed the original. I gave it back to him. He destroyed it. He filled in the details here (indicating), offered this to Hatfield and Hatfield signed this (indicating) one.

Trial Examiner: That is General Counsel's Exhibit 11 for identification?

The Witness: Yes. [59]

* * * * *

Q. (By Mr. Scolnik): With respect to General Counsel's Exhibit 11, I note that there is a notation on the right-hand side in red pencil. Can you identify that, Mr. Johnston?

A. I put that on there.

Q. What does it say?

A. It says, "Deducted 15 May '55 pay roll."

Q. What is the mark underneath that?

A. Initialed by myself.

Q. When did you put that notation on there?

A. Prior to making up the pay roll period ending May 15. More than likely it was the 14th. It could have been the 16th.

Q. Your best recollection is what?

A. I do know that regardless of the particular time I put it on, I put it on the pay roll period ending the 15th of May. I computed it on the 16th of May.

(Testimony of Herbert Johnston.)

Q. Do you have any recollection at the present time of when you put that notation on there?

Trial Examiner: You mean the day?

Mr. Scolnik: The day.

Q. (By Mr. Scolnik): What is your best recollection?

A. Well, the only thing I can say is that it was the evening [60] of the 13th and not the 16th.

Q. What did you do with the document?

A. I filed it.

Q. Was it a part of your duties in connection with the check off system to maintain a file of such check off slips for the woods employees?

A. Yes.

Mr. Scolnik: I will offer in evidence General Counsel's Exhibits 10 and 11 at this time.

Trial Examiner: Any objection?

Mr. Halpin: No objection to 10. I don't object to 11 either.

Trial Examiner: There being no objection, the papers are received in evidence and I will ask the reporter to kindly mark them as General Counsel's Exhibits Nos. 10 and 11 respectively.

(The documents above referred to, heretofore marked General Counsel's Exhibits Nos. 10 and 11 for identification, were received in evidence.)

[See pages 233-235.]

Trial Examiner: Is this a good place to recess for lunch?

Mr. Scolnik: Yes. I just wanted to ask permis-

(Testimony of Herbert Johnston.)

sion to withdraw the originals of General Counsel's Exhibits 10 and 11 and substitute, in the case of General Counsel's Exhibit 10, a typewritten carbon copy, which are identical, except that the signatures are not on the carbons. [61]

In connection with General Counsel's Exhibit 11, I would like to substitute for the original photo-static copies.

Trial Examiner: Any objection?

Mr. Halpin: No objection.

I would like to have the originals to show to Mr. Gordon sometime during the proceeding.

Mr. Scolnik: I will make it available any time.

Trial Examiner: The substitutions may be made.

With respect to General Counsel's Exhibit No. 11, do you know who filled that out?

The Witness: Jim Gordon filled it out.

Trial Examiner: Did you see him do it?

The Witness: Yes.

Trial Examiner: Did he fill it out on the date it bears?

The Witness: Yes.

Trial Examiner: Did you see Hatfield sign it?

The Witness: Yes.

Trial Examiner: Did he sign it on that date?

The Witness: Yes, sir. [62]

* * * * *

Mr. Scolnik: I will ask the reporter to mark for identification, as General Counsel's Exhibit No. 12, a printed green card purporting to be an application for membership into the International

(Testimony of Herbert Johnston.)

Woodworkers of America, with certain handwritten entries appearing on the face of it.

(Thereupon the card above referred to was marked General Counsel's Exhibit No. 12 for identification.)

Q. (By Mr. Scolnik): I will hand you General Counsel's Exhibit No. 12 for identification, Mr. Johnston, and ask you if you can identify that.

A. Yes.

Q. Will you tell us what it is? [63]

A. It is an application for membership in the union, which Charles Hatfield signed, and witnessed by Jim Gordon.

Q. Was that signed in your presence?

A. Yes.

Q. You saw Hatfield sign that? A. Yes.

Q. Did you see Gordon sign it? A. Yes.

Q. Was it signed on the date indicated on it?

A. Yes.

Q. Was it given to you? A. No.

Q. Is that the card which you have referred to previously in your testimony as to the incidents which occurred on May 13?

A. I don't believe we referred to this card before. Have we?

Q. It was my recollection that you had indicated that a membership card had been signed.

Trial Examiner: When did you see Hatfield and Gordon sign that?

The Witness: On the 13th, the date indicated here.

(Testimony of Herbert Johnston.)

Trial Examiner: What time of day?

The Witness: Approximately 11:00 o'clock in the morning.

Trial Examiner: Is that the time when Hatfield signed those other two papers?

The Witness: That is right. [64]

Trial Examiner: In the truck?

The Witness: Yes.

Trial Examiner: What did Hatfield do with the card after he signed it?

The Witness: This card, at that time, was retained by Jim Gordon.

Mr. Scolnik: I will offer General Counsel's Exhibit 12 in evidence.

Trial Examiner: Any objection?

Mr. Halpin: No objection.

Mr. Scolnik: I would like to request permission of the Examiner to withdraw the original and substitute in its place two photostatic copies.

Trial Examiner: Any objection?

Mr. Halpin: No objection.

Trial Examiner: Do you know who filled out the card where it says "Name, home address, employed at, starting date, date of birth," and his social security number?

The Witness: Jim Gordon filled that out.

Trial Examiner: Did you see him do it?

The Witness: Yes.

Trial Examiner: Any objection?

Mr. Halpin: No objection.

Trial Examiner: There being no objection, the

(Testimony of Herbert Johnston.)

paper is received in evidence and I will ask the reporter to kindly mark [65] it as General Counsel's Exhibit No. 12.

(The card above referred to, heretofore marked General Counsel's Exhibit No. 12 for identification, was received in evidence.)

[See page 235.]

Q. (By Mr. Scolnik): You testified previously, Mr. Johnston, that in connection with your job you performed certain duties in connection with the dues, check off system. Would you explain in detail exactly what you do in that connection, or what you did during May 1955, what the practice was, what your practice was?

A. When the union job steward presents me with a check off slip, signed by a particular individual, I enter it on the record that I keep of all deductions to be taken from that man's pay roll. I then file the authorization, the white copy, I file that authorization in the file that I have for that purpose and I retain it there.

Then the information that I have on my record is translated on to a pay roll sheet for each particular pay period.

Our pay period ends on the 15th and on the last of the month. In the case of union deductions, I deduct them on the pay roll sheet from those men who I have authorized deduction slips for.

I then make the deduction, along with other deductions that they may have.

I then send the pay roll sheet to the pay roll

(Testimony of Herbert Johnston.)

department [66] in Anderson so their check can be drawn.

Q. And you retain the check off slips?

A. Yes, I do.

Q. Was that the practice in May of 1955?

A. Yes.

Q. Had that been the practice prior to that time? A. Yes.

Q. Now, in the case of a check off slip which is dated between the 1st and the 15th of a month, on what pay roll period, pay sheet, do you make a notation of that?

A. On the pay roll period ending the 15th of that month.

Q. In case of a check off slip that is dated between the 16th and the end of the month, what is your practice?

A. I deduct that from the pay roll period ending the following 15th.

Mr. Scolnik: I will ask the reporter to mark for identification, as General Counsel's Exhibit No. 13, a single page document containing various ruled horizontal and vertical lines, and various pencil and crayon and printed notations thereon.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 13 for identification.)

Q. (By Mr. Scolnik): I hand you General Counsel's Exhibit 13 for identification and ask you if you can identify the document and, if so, tell us what it is. [67]

(Testimony of Herbert Johnston.)

A. This is a pay sheet, the information of which is used to draw a check, pay check. This is the pay sheet for the period ending the 15th of May, 1955, for Charles Hatfield, indicating the hours he worked, and on which days, indicating the amount of money, indicating the deductions and the net amount.

Q. Will you state what entries on that sheet were made by you?

A. All of them, all entries were made, with the exception of the two red check marks. The check marks indicate that the mathematical portion of that pay roll has been checked by our pay roll department and assumed to be correct.

Q. I notice, I call your attention to an entry of \$23.50 in the lower right-hand corner. Can you explain what that is?

A. That \$23.50 is for union dues, that is, initiation and current month's dues.

Q. You put that entry in there?

A. Yes.

Q. On the basis of Hatfield's check off slip?

A. That is correct.

Q. When did you put that entry on that sheet?

A. The 16th of May.

Q. What did you do with the sheet?

A. Sent it to our pay roll department in Anderson.

Mr. Scolnik: I will offer General Counsel's Exhibit No. 13. [68]

Trial Examiner: Any objection?

(Testimony of Herbert Johnston.)

Mr. Halpin: No objection.

Trial Examiner: There being no objection, the paper is received in evidence and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 13.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 13, was received in evidence.)

Mr. Scolnik: I will request permission to withdraw the original and substitute photostatic copies in its place.

Trial Examiner: Any objection to the substitution?

Mr. Halpin: I am afraid I am going to have to object on the ground that an erasure on the original does not show on a photostat.

Trial Examiner: What erasure?

Mr. Halpin: Near the numbers 23.50, the right lower end portion of the original.

Trial Examiner: Can you clear that up, Mr. Scolnik?

You mean where the line is?

Mr. Halpin: Yes.

Trial Examiner: Can you clear that up, Mr. Scolnik?

Q. (By Mr. Scolnik): Mr. Johnston, I direct your attention to a space in the lower right-hand portion of this document, immediately to the right of a printed word "U-Store." There appears to be a horizontal line about half an inch long, filling [69] two little squares, and there appears to be

(Testimony of Herbert Johnston.)

an erasure underneath that horizontal line. Can you explain that?

A. Yes. That line under the key of "U-Store" is for any charges the man might have incurred at the company owned commissary. Our normal procedure is to deduct them from his next pay check. In this particular case the man asked me not to deduct it inasmuch as he, for reasons unknown to me, needed a certain amount of money and which, by deducting the \$25 or \$26, whatever it was, would have cut him short of his obligations. So I erased that, carried it over on the accounts receivable, and drew that line in there. That is not an uncommon practice at all.

Trial Examiner: Any objection now?

Mr. Halpin: No objection now, with this in the record.

Trial Examiner: There being no objection, the paper is received in evidence and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 13.

The substitution may be made.

Mr. Scolnik: I will have the original available.

Mr. Halpin: All right.

Q. (By Mr. Scolnik): I have one further question about this document, Mr. Johnston. I direct your attention to a pencil notation which seems to be the word "Check" immediately to the right of the \$23.50 entry. Can you explain what that has reference to? [70]

(Testimony of Herbert Johnston.)

A. No. That was put there by someone other than myself.

Q. Well, I believe that you testified a few moments ago that all of the entries on this sheet, with the exception of two red pencil check marks, has been put on there by yourself. So I will ask you to carefully go through the entire document now and see whether there are any other entries which appear on that document which were not put on by yourself.

A. Well, this "check OK," I didn't put that on there.

Trial Examiner: You put on there, "See Walt Hansen before paying this man"?

The Witness: That is right, yes.

Trial Examiner: When did you put that there?

The Witness: At the time I computed the pay roll.

Trial Examiner: Do you know whose handwriting "Check OK" is in?

The Witness: No, I don't. It wasn't done in our office.

Q. (By Mr. Scolnik): Were any other pay sheets similar to this document sent in to the pay roll department at Anderson at the same time that this one was sent in? A. Yes.

Q. What others?

A. Well, one representing each man employed in the woods.

Q. Can you state approximately how many were sent in all together at that time?

(Testimony of Herbert Johnston.)

A. At that particular time somewhere in the neighborhood of [71] between 60 and 70.

Q. With reference to your testimony, Mr. Johnston, about the events and conversations on May 13 involving you and Mr. Gordon and Mr. Hatfield, I will ask you whether you recollect any statement made by Mr. Gordon as to any attempt that he made to contact Mr. Hatfield prior to the 13th?

A. Yes. Jim Gordon told me that he had intended, on the morning of the 3rd, he had intended——

Trial Examiner: Of what?

A. (Continuing) Of May—that he intended to sign into the union three men, of which Hatfield was one, and he also mentioned Thomas and Spangle.

On the 2nd, when he went to work, he sustained an injury. I believe it was the night of the 2nd that I took him to the hospital and the doctor kept him and prevented his returning to work on the 3rd, at which time he stated that he had the intention of signing those three men into the union.

Q. (By Mr. Seolnik): When did he make this statement?

A. On the morning of the 13th in discussing it he had mentioned that to me.

Q. Do you know Spangle and Thomas?

A. Yes, I do.

Q. Did you receive a check off slip signed by Spangle and Thomas? A. Yes, I did. [72]

Q. When did you receive those?

(Testimony of Herbert Johnston.)

A. On the 5th of May.

Q. Who did you receive them from?

A. Ernest Dickey.

Q. Do you have those? A. Yes, I have.

Q. Can I have them, please?

A. (Producing check off slips.)

Q. Where did you receive the check off slips from Mr. Dickey? A. In the camp office.

Q. Do you recall approximately what time of day that was?

A. It was after work, between 5:00 and 6:00 some place.

Q. Was anyone else present, other than you and Dickey? A. Not to my recollection.

Q. Would you state whatever conversation took place between you and Dickey at the time he gave you the slips?

A. As I recall, I was quite busy at the time and I don't believe there was a conversation. I believe he just mentioned that he had some check offs. I don't even know that he did that, but just laid them on my desk.

Q. What did you do with them?

A. I filed them after having made a record of them.

Q. You say "after having made a record of them." Would you explain what you mean?

A. I maintain a record, as I explained before, of each man [73] in the woods, and the authorized deductions to be taken from his check. I put the deduction as authorized opposite their name so in

(Testimony of Herbert Johnston.)

computing my following pay roll I would have the proper deductions. Then I file the slips in a permanent file.

Q. Now, I hand you again General Counsel's Exhibit 13 in evidence and ask you whether you made a similar entry of \$23.50 on similar pay sheets for Mr. Thomas and Mr. Spangle?

A. Yes, I did. [74]

* * * * *

Cross Examination * * * * *

Trial Examiner: The 13th was a Friday, is that right?

The Witness: Yes.

Q. (By Mr. Halpin): On either one of those two days, whenever it was, is it your testimony that Mr. Hansen didn't inform you that the company had received a discharge letter on Mr. Hatfield? A. Correct.

Q. He didn't say anything about that, is that right? A. That is correct.

Q. Now, prior to giving Mr. Hansen this letter, which you typed and Mr. Hatfield signed, had you told Mr. Hansen about your other conversations with Mr. Hatfield? A. Prior to when?

Q. Prior to the time that you gave Mr. Hansen the nunc pro tunc letter which you typed and Hatfield signed, had you communicated to Mr. Hansen your earlier conversations with Mr. Hatfield?

A. Yes.

Q. Did you tell him about your first conversation with Mr. Hatfield which I believe you testified

(Testimony of Herbert Johnston.)

took place on the 11th of May? A. Yes, I did.

Q. When did you tell Mr. Hansen about that?

A. On the morning of the 12th. Hatfield was again in the office and at that time I explained to Walt that he had been in twice the day before.

Q. At that time did Mr. Hansen say anything to you about having had a request for Mr. Hatfield's discharge?

A. I think we covered that before. No.

Q. Did you tell Mr. Hansen on the 12th of May substantially the same thing about the conversation you had with Hatfield on the 11th of May, that you testified to here in this hearing?

Mr. Seolnik: I object to that as being too vague.

Trial Examiner: Overruled.

A. I think in my conversation with Walt I explained to him about everything I knew, yes.

Q. (By Mr. Halpin): Did you tell him about your conversation that you had with Hatfield on the evening of the 11th of May?

A. I am sure I did, yes.

Q. Now, at the time that you talked with Mr. Hansen on May 12th, as I understand it from your testimony, Hatfield hadn't been in again on the 12th. Is that right?

A. I think you will find the testimony says Hatfield was in on the 12th.

Q. About what time of the day was he in?

A. He was in early in the morning; I would say 6:30 or a quarter to 7:00.

(Testimony of Herbert Johnston.)

Q. And did Mr. Hansen come in after that, or was he there before that?

A. I don't know. Sometimes he comes to the camp, arriving at 5:30, sometimes 6:00 and sometimes 6:30. I don't know on [87] that particular morning. I don't know. [88]

* * * * *

Q. Now, with respect to the exhibit which contains the deductions for Mr. Hatfield, Exhibit No. 13, you stated on direct examination that there had been a change made in the [93] place where there is a deduction for purchases from the company's store. Is that correct? A. Yes.

Q. When was that change made on the original sheet?

A. It was probably made between the 13th and 16th of May.

Q. You used the word "probably." Do I understand that you don't recall for sure when it was made?

A. No. In closing out the commissary charges I do it according to whatever is best suitable to my schedule. I could have either done it on Friday, the 13th, and I may have done it on Saturday, the 14th. I very often do them on Sunday, but I don't know if I did them on Sunday that week.

Q. Could you tell us this, Mr. Johnston: Did you do it before you received the authorization from Mr. Hatfield or after you received the authorization from Mr. Hatfield?

(Testimony of Herbert Johnston.)

A. No, I can't tell.

Q. You could have done it either before or after, is that right?

A. It could have been done either time.

Q. Now, if that is true, isn't it also true that that pay roll sheet could have been made up before you received the authorization from Mr. Hatfield?

Mr. Scolnik: What part of the pay roll sheet are you talking about?

Q. (By Mr. Halpin): The notation which you made in the pay [94] roll sheet.

A. That is highly improbable because you couldn't put the time the man worked on the 14th, you couldn't put it down on the 13th.

Q. Is it your practice to put the deductions in before the pay roll period is up?

A. I think you will observe the deductions are based largely on the gross amount of the check.

Q. That is what I am driving at. When did you make the entries of those deductions?

A. The deductions pertaining to the gross amount of the check are made after the gross is figured, which cannot be figured until the end of the pay period. As near as possible to the closing day of the period I attempt to close the commissary charges and enter them. Insurance and union dues I can do it any time in the first half of the month because those are standard and do not change.

Q. But you don't enter the commissary charges ordinarily then until the whole thing is completed,

(Testimony of Herbert Johnston.)

until the pay roll period is over, isn't that right?

A. No, it is not right. I will try that again. The pay roll period ends on the 15th. As near as possible to the 15th I close any commissary charges in order that credit might be given the commissary for the amount of money owed us on the first half of the month. If I closed them on the 12th, for [95] example, there would be three days that charges would be carried over to the second half, creating a hardship on the people in having a larger bill at the end of the month and a smaller bill the first half of the month. So it is my practice to close the charges as near as possible to the 15th, but never past the 15th.

Q. Never what?

A. Never past the 15th, to deduct the commissary charges and enter those.

Q. When you make the deductions do you immediately post them on the pay roll record, or do you wait until you finish with the other deductions on the pay roll record and put them all on at once?

A. The commissary charges, when I total them up, well, I total up the men who have a charge account with us. I total the totals up. Then I go through my pay roll sheet entering the amounts and, of course, it is not at the same time as the other because in this particular case the man paid (indicating) \$25.60 income tax, but how could you know that on the 14th?

Q. That is what I am trying to find out. You

(Testimony of Herbert Johnston.)

think it could have been anywhere from the 12th through the 15th that you made that entry on the commissary charges, is that right?

A. It is possible anywhere between the 12th to the 15th.

Q. On direct examination you testified that that entry was changed at the direction of Mr. Hatfield. Is that correct? [96]

A. I wouldn't say the direction, but at his request.

Q. At the request of Mr. Hatfield, is that right?

A. That is correct.

Q. When did he make that request?

A. I don't recall the date.

Trial Examiner: He said he didn't know whether it was before or after he signed the authorization.

The Witness: I think I should explain that a request such as this is not at all uncommon. I have many, many of them. I think if you go back through the records covering this same period you will probably find four or five more people who have had to have a little consideration in paying what they owed and carry them over to the next pay day. I accommodate them in most cases whenever possible.

Q. (By Mr. Halpin): In effect, on this particular item you, acting as an agent for the company, lent Mr. Hatfield that amount of money in order that he could pay his dues with it, and initiation fee?

A. That is not a fact.

Q. He didn't make that request at the same time as he made his authorization slip out?

(Testimony of Herbert Johnston.)

A. No. [97]

* * * * *

Trial Examiner: Did all the men who work in the woods work during the winter of 1954-1955?

The Witness: No, sir. We had a winter layoff.

Trial Examiner: Would Hatfield have been laid off?

The Witness: Yes, he was.

Trial Examiner: When did you lay him off?

The Witness: We didn't log a day in December. We commenced for a couple of days in March and we were off the period of time in between that.

Trial Examiner: You say from the 1st of December until sometime in March?

The Witness: I would say in Hatfield's case, from the 1st of December to the 15th of March he did not work. I believe I have his exact figures if you want to see them.

Q. (By Mr. Halpin): Mr. Johnston, with respect to this nunc pro tunc letter you say you made more than one copy? A. Yes.

Q. And the original, what was done with the original?

A. The original was given to Walt Hansen.

Q. By whom? A. By myself.

Q. When did you give him that?

A. On the 13th or the 14th. I don't remember which date. It was one of those two days.

Q. What did you do with the other copies?

A. I think Hatfield kept one, I filed one in my file, and sent Crimmins one, and sent one to Mr. Hood. [100]

(Testimony of Herbert Johnston.)

Q. Who sent one to Crimmins? A. I did.

Q. When did you mail that to him?

A. On the 13th, I believe.

Q. Did Mr. Hatfield request that you do that?

A. In going over the letter I explained to him what the carbon copies meant at the bottom, that is, mailing carbon copies to Mr. Hood and Mr. Crimmins. He agreed that that was fine. Whether it was actually at his request or not, I don't know.

Q. You sort of suggested it to him, didn't you, isn't that what happened?

A. The suggestion being that the letter was submitted to him for his approval, and there was nothing in the letter hidden from him. Everything in the letter was explained to him.

Q. Did you explain what *nunc pro tunc* meant?

A. Yes.

Q. What did you tell him that meant?

A. I said it was a Latin term which means "now for then."

Q. Did you tell him the effect of that would be to withhold dues back until November?

A. Yes, I did.

Q. Did he agree to that at the time you had him sign it? A. Yes, he did.

Q. Other than the authorization—I am talking now about the authorization which was destroyed and which is not in evidence— [101] other than that authorization which you received apparently right out there in the woods, have you ever before

(Testimony of Herbert Johnston.)

received an authorization directly from the man himself?

A. This authorization was not received by me directly from Hatfield. It was given to me by Gordon.

Q. You were standing there together, weren't you, all three of you?

A. Gordon handed it to me. We were standing in a group. The man didn't hand it to me.

Q. But that is the only time you have ever received an authorization while the man was actually present? A. No.

Q. You have done that before?

A. I can't recite the incidents exactly. I do know that my office has been used to sign men into the union. I think that one night the entire camp was at my house playing cards, at my wife's invitation, and I believe some union deduction slips were handed me that night over the card table, with men who had signed them present.

Q. How long have you known Mr. Gordon?

A. Since he went to work. I didn't know him prior to going to work for the company. I don't recall what date he did go to work.

Q. You knew that he had been sick for some time prior to May 12th, did you not? [102]

A. Yes.

Q. And you testified this morning that you discussed the Hatfield matter with him after he came back, is that correct? A. Correct.

Q. Did you explain to him at that time that the

(Testimony of Herbert Johnston.)

union had indicated to you that they wanted Hatfield discharged? A. I did.

Q. You told him that? A. I did.

Q. That was on the 12th?

A. I related to him our conversation, the conversation between Bob Crimmins and myself.

Q. Indicating that you knew that Crimmins wanted him discharged, is that right?

A. Correct.

Q. Now, you say that you knew that Gordon was a job steward, is that right?

A. I knew he had been functioning as a job steward.

Q. When you talked to him on the 12th you also knew that Ernest Dickey had refused to take Mr. Hatfield's authorization, did you not?

A. I did.

Q. And isn't it a fact, Mr. Johnston, that you approached Mr. Gordon because you believed that Mr. Gordon didn't know all of the circumstances surrounding the Hatfield case? [103]

A. No, that is not a fact. I think that when you get Gordon on the witness stand you will find that the facts I related to him have developed to be the absolute truth, and I don't believe there is any question that I imposed upon any ignorance that he might have had in the case. It was fairly explained to him.

Q. Why didn't you see Mr. Dickey about this matter?

A. Mr. Dickey, unfortunately, or fortunately, I

(Testimony of Herbert Johnston.)

am quite sure Mr. Dickey, having once refused, would surely not sign the man up. I did, however, have a conversation with another job steward.

Q. Who was that? A. Harvey Watson.

Q. Are you sure that he was a job steward?

A. No. I am not sure any of them are.

Q. Did you ask Mr. Watson to sign up Hatfield?

A. This was my conversation a little later than the date in which Gordon did sign him up. Watson then stated that he thought that Dickey had poorly handled the situation and that the situation would have never come up had he properly approached Hatfield. Watson said that he was very sorry that the opportunity hadn't been his to sign him up because it would have eliminated all of this trouble which at that time had developed and which he felt would later develop.

Q. Now, at the time when Hatfield came in on the 11th, and also on the 12th, did you tell him that he should see Mr. [104] Crimmins about this matter? A. No.

Q. You didn't suggest that to him?

A. No.

Q. At the time up through the 13th, in other words, from the 6th through the 13th did you know that Mr. Hatfield had anti-union sentiments and had expressed them rather freely?

A. I still don't know that he has anti-union sentiments.

Q. You didn't know it then?

(Testimony of Herbert Johnston.)

A. No. I still don't know it. [105]

* * * * *

The Witness: An authorization that I receive between the 1st of the month and the 15th of the month will be deducted from the pay roll, or pay period ending the 15th of the month.

Q. (By Mr. Halpin): It doesn't matter what date it has on it, the 1st or the 14th? [106]

* * * * *

Redirect Examination

Q. (By Mr. Scolnick): During counsel's cross examination a query was made as to how it happened that Mr. Gordon was in the camp [130] office at certain times. I would like to have you state for the record exactly where Mr. Gordon was living at that time in relationship to the camp office.

A. He lives in camp a couple of hundred feet away. His home is a couple or three hundred feet from the camp office.

Q. Now, I believe that you also stated in your testimony that Mr. Gordon was, or had suffered an industrial injury and had to go to the hospital about the beginning of May. When did he return to work?

A. He returned to work sometime in the latter part of May. I don't know just when. I would have to look it up to give the exact date.

Q. Would your records indicate when he returned to work?

A. Not the records that I have with me, no. I think perhaps Del Smith can give you that information.

(Testimony of Herbert Johnston.)

Q. With respect to Mr. Thomas and Mr. Spangle, have you ever made deduction for union dues for either Mr. Spangle or Mr. Thomas for any of the amounts from November 1954 through and including April 1955? A. No. [131]

* * * * *

WARREN W. ANDERSON

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Warren W. Anderson. [156]

* * * * *

Direct Examination

Q. (By Mr. Seelnik): Mr. Anderson, you are employed by the Ralph L. Smith Lumber Company? A. Yes.

Q. What is your position with that company?

A. Pay master.

Q. Where are you employed?

A. I am located at Anderson, or at the Ralph L. Smith Lumber Company main office at Anderson.

* * * * *

Q. Who was your immediate superior at that time? A. Perry Elsmore, Office Manager.

Trial Examiner: Elsmore? [157]

The Witness: Elsmore.

Trial Examiner: Spell it, please.

The Witness: E-l-s-m-o-r-e.

(Testimony of Warren W. Anderson.)

Q. (By Mr. Scolnik): Who is Mr. Elsmore's immediate superior? A. Robert Mason.

Q. What is Mr. Mason's position?

A. He is Comptroller-Treasurer.

* * * * *

Q. Does your department make up the employee pay checks? A. Yes.

Q. Does that include the plant employees as well as the woods employees?

A. Yes. We prepare all pay checks for all employees. [158]

* * * * *

Q. (By Mr. Scolnik): Does your department have anything to do with the administration of the union dues check off system?

A. Yes. We are in charge of it. We control it and prepare the lists that we send to the union monthly, and I request the check and turn it over.

Q. What check are you referring to?

A. Of the money that we have collected each month from the employees.

Q. Are you personally familiar with the provision of the contract between the company and the union which pertains to the union shop and the check off system? A. Yes.

Q. Now, during your period of supervising the pay roll department and through the month of May, 1955, has the procedure with respect to the mechanics, mechanical operation of the check off system, been substantially the same?

A. I took over in April of 1954. Except for a

(Testimony of Warren W. Anderson.)

few minor changes that have been made it is substantially the same. In the spring of 1955 there were a few minor changes. The union, [159] prior to the spring of 1955, never—I shouldn't say never—we rarely picked up dues in the second pay period. We have two pay periods; the 1st through the 15th, and then the 16th through the end of the month. In the spring of the year we started, or the union would inform us of the men that, for reason of sickness or vacation, possibly did not have time in the first half, and union dues were not picked up for them. In other words, they would inform us of the name of the man and we would check and if the dues hadn't been deducted in the first half we made deductions in the second half of the month and remitted that following the month of May.

Since that time I believe July was the first month that we started doing that automatically, without any list being prepared by the union.

Q. In other words, prior to July, 1955, it was only on rare occasions that you made dues deductions from the second half of the month's pay roll. The customary procedure was to make it only as of the 1st, that is for the 1st to the 15th pay roll, is that right? A. Right.

Q. Would you describe, please, the detail, the actual mechanics, or operation of the check off system as it existed in May, 1955, and some months prior, insofar as your particular department had anything to do with the check off system? What I would like you to do is start from the beginning and

(Testimony of Warren W. Anderson.)

explain exactly what [160] happens chronologically to the best of your recollection and ability.

A. Yes. When a man signs a check off slip for, that is, referring to the plant and log transportation employees, a letter of transmittal is made up by the local union and that letter of transmittal, or the check off slips that accompany that letter of transmittal, are sent to our Personnel Manager.

* * * * *

Q. Excuse me a minute. Do I understand that the check off slips themselves are maintained in the files of your particular department after you have received them?

A. The check off slips of all production and maintenance employees go through the Log Transportation Department, and the actual woods, or logging department is maintained in the woods. [161]

* * * * *

Q. Would you continue describing the procedure now, from the time that you receive the check off slips for the plant employees — what is your next step?

A. We post the amount authorized to be deducted by the employee to the next pay sheet ending the 15th of the month. If we receive it prior to the 15th of the month we post it to that pay period. If it is received after that date it is carried over to the following first half pay period and posted to that sheet. We always, almost always have three pay rolls ahead to be working on as far as individual pay sheets are concerned.

(Testimony of Warren W. Anderson.)

Q. You are talking about the procedure in May 1955? A. Right.

Q. My questions—I forgot to be specific—are directed to the procedure in May 1955. You say you post the amount on the pay sheets. Can you identify what you mean by “pay sheets”—are those documents similar to the document which is General Counsel’s Exhibit 13 in evidence, which I now show you?

A. Yes, they are similar. This (indicating) happens to be a woods pay sheet. The only difference would be in the account numbers. Otherwise these sheets contain pretty much the same information.

Q. So that in your department the pay sheets for the plant [163] employees are made up in your department? A. That is right.

Q. And for the woods department the pay sheets are made up by Mr. Johnston, and he sends them to you?

A. They are completed by Mr. Johnston in most cases, yes. We actually send the pay sheets to him. He records the information on them and arrives at the amount of hours the man has worked, and the money he has coming, and the deductions that are standard to be taken out in the woods.

Q. Let us start from the point now, where your department has for a particular pay roll period all the pay sheets made up with the various notations posted on them for all the plant employees and all the woods employees. What is the next step after that?

(Testimony of Warren W. Anderson.)

A. Well, after they are completely computed and checked, and the net amounts arrived at, then the next step is to prepare a pay sheet, I mean a pay check for the individual. This is accomplished in our operation.

We have a National cash register which machine accomplishes three things for us:

1. It prints the information on an individual's earnings record.

2. It prints a pay roll journal sheet.

3. It makes a check.

On the stub it prints the deductions and identifies them [164] by letters. It completes the net amount on the check as to net pay.

Q. You have referred to three different documents. By "check" I take it you mean the employee's pay check? A. Right.

Q. You also referred to an earnings record. Could you describe what form of document you are referring to there?

A. It is an individual earning record, and that is a form required to be maintained by law.

Q. Can you describe briefly the physical appearance of it?

A. Yes. In our company it is buff or yellowish type colored piece of paper of rather heavy characteristics. It is about 11½, I would say, by 9, approximately. It is lined off as to pay periods and marked by quarters. After it is filled in it has the man's name and his address, social security number, and other pertinent information on it.

(Testimony of Warren W. Anderson.)

Q. And you have a card like that for each employee? A. Yes.

Q. That is, on the pay roll? A. Yes.

Q. Each card has the particular employee's name on it? A. That is right.

Q. Now, the third document you referred to was a journal. Can you describe what you mean by the journal? Describe what physical appearance the document has and what it consists of [165] and its functions.

A. The pay roll journal is a piece of white paper lined, about 14 by 16. It has 40 lines only. It is ruled down the paper as to information, the employee's name, the gross amount of money, the net amount of money, the check number, and any deductions that are made from his pay check according to key. We call it "key." It is an alphabetical key.

Q. I understand that these three documents, pay check, earnings record card and the journal are printed simultaneously in a machine operation?

A. That is right.

Q. You also referred to a deduction list, I believe? A. Right.

Q. When is that document prepared in relation to this machine operation that takes care of these three other forms?

A. It is prepared as soon as practical after the first half of the month's pay roll is completed. We try to get this completed prior to the 25th, which is normally completed between the 22nd and 23rd through the 28th. It is a list that we furnish the

(Testimony of Warren W. Anderson.)

local union. It has the name of the employees of the production and maintenance employees, both in the plant and in the woods, who have worked during the first half of the month, or on our pay roll during that period. It is a listing that shows the amount of money that has been deducted for union dues or initiation fees, or if they have no authorization it so states, [166] and any other information that might be helpful to the union, or whether a man has worked. We normally post it if a man doesn't work.

Q. Does it have a legend on it? A. Yes.

Q. Will you describe that?

A. It is a union dues collection list for a certain month. In this case it would have been union dues collection list for May 1955.

Q. I take it that opposite each name on the list there may or may not be a notation?

A. That is right. We have a legend, letters that state as to—I might be more specific. We have "NA" which means "No authorization," "NW," which means "No work," and also, unless otherwise posted, \$3.50 is deducted from each individual. In other words, unless something other than union dues was deducted from a man, the normal \$3.50, there is a notation opposite his name.

Q. If there is nothing opposite a name it means that \$3.50, a month's dues, has been deducted?

A. That is correct.

Q. In case of an employee who is paying his ini-

(Testimony of Warren W. Anderson.)

tiation fees and dues for the first time, what kind of a notation would be opposite his name?

A. If the full initiation fee was picked up there would be [167] the amount of \$13.50 opposite his name.

Q. Was that the procedure in May 1955?

A. Right.

Q. Suppose the employee had been employed for over 30 days and you didn't have a check off slip in your file, what, if any, notation would appear opposite his name?

A. If he had time within that pay period "NA" would go opposite his name.

Q. If the employee has not worked during that pay period what notation would be opposite his name?

A. "NW."

Q. This document, you call it a dues deduction list?

A. Union dues check list, I believe is the title we have on it.

Q. How many copies of this list do you make up?

A. Two; one for the local union and one for our file.

Q. Are there any differences between the copy that you keep for the company's file and the copy that you give to the union?

A. Well, yes. We make two copies up. As to names they are identical. We use the office copy as our work sheet in preparing this. We take this information from our pay roll journal and in trans-

(Testimony of Warren W. Anderson.)

posing the information from the pay roll journal to the collection sheet we sometimes make errors and we have to prove it out. We must know we have the proper amount of money, and everything, before we actually make the union copy. [168]

We always have other stuff on our record at the bottom of our sheet. Normally we put the number of men in the column that have \$3.50, the number that have \$23.50, the number that have maybe \$13.50, and later we add those together and extend them to see if we have the right amount of money reported that we have collected during the period.

There might be notations on the union copy for their information, and on our copy it might be briefer, or more explanatory, depending on what it was for.

Q. How is the copy given to the union?

A. It is handed to Waldo Thomas. I believe he is the Recording Secretary, or Financial Secretary for the local union.

Q. By whom? A. By me.

Q. Where does the delivery take place?

A. At the Ralph L. Smith office at my desk.

Q. Do you receive any kind of a receipt for the delivery of that list? A. No, I do not.

Q. Do you keep any record or notations indicating that you have delivered such list on a certain date? A. No, I do not.

Q. Subsequent to delivery of the list to the union, do you also give the union a check covering

(Testimony of Warren W. Anderson.)

the amount of the dues which have been deducted as shown on that list? [169]

A. Yes. As soon as practical after the 1st of the month I make a check request and process it too. This request is for the amount of money that has been collected in the prior month and should be turned over to the union.

Q. And approximately when do you deliver the check to the union?

A. It is before the 10th of the following month, and normally Mr. Thomas picks it up around the 5th, 6th, 7th and sometimes maybe a little earlier, but I would say normally around the 6th.

Q. Where does he pick it up?

A. At the Ralph L. Smith Lumber Company office at my desk.

Q. Who gives it to him? A. I do.

Q. Now, I would like to ask you to go back over this procedure with specific reference to what actually happened during the month of May, 1955, and to the best of your recollection, and referring to any record that you might have with you, if you need to do so, and indicate when, to the best of your recollection, each of these various acts or events took place?

A. As of May we would have proceeded as normal. We started our pay roll, on the actual computation of the pay roll, on the 16th, Monday.

Q. When did you get the pay sheets similar to General Counsel's Exhibit 13, which you are holding in your hand? [170] When did you get those

(Testimony of Warren W. Anderson.)

from Johnston for May 1st through May 15th, that pay roll period, to the best of your recollection?

A. I believe they came on a truck. My best recollection is that I received them the evening of the 16th. It could have possibly been the morning of the 17th of May.

Q. Do you have any records or documents which would indicate definitely when you received them?

A. Not in my possession. The only method I would have of knowing definitely, or being able to say definitely, would be if I had issued an early check to a woodsman on the 16th, whether I received them the 16th. I do know that they were there the morning of the 17th because I worked on them.

Q. Then the next step, according to your testimony, is checking the computation?

A. That is right. We check the computation of the woods portion of the pay roll. The rest of it we compute at the main office. We also do some computation on the woods pay roll.

Q. To the best of your recollection, what day or date in May was your department checking the computation on the woods pay sheets?

A. Well, I checked them the 17th, the morning of the 17th, and completed them.

Q. You personally did so? A. Right.

Q. Then, as I understand it from your testimony, the next [171] step is this machine operation whereby there is a simultaneous preparation of the journal, employee pay check, and an individual em-

(Testimony of Warren W. Anderson.)

ployee earnings record. When, to the best of your recollection, was that done in May 1955 for the 1st to the 15th pay roll?

A. The afternoon of the 18th we started running the sawmill pay sheets. On the evening of the 19th, or the morning of the 20th, to the best of my recollection — I don't remember whether we completed the pay roll the night of the 19th or not—but the morning of the 20th we had completed that phase of the pay roll and had balanced the pay roll for that period.

Q. And when were the actual pay checks issued to the employees?

A. The majority of them were issued the evening of the 24th and the morning of the 25th.

Q. Now, with respect to the dues collection list, to the best of your recollection, when was that list prepared in May 1955 for from the 1st to the 15th pay roll?

A. That check list was prepared in the week between the 23rd and the 27th. The exact day it was prepared I would not definitely know.

Q. What is your best recollection on it?

A. I would have to assume, with the pay roll being completed the morning of the 20th, that that list was prepared the 23rd or 24th.

Q. Now, approximately when, to the best of your recollection, [172] was that list or a copy of that list delivered to the union?

A. I do not remember when Waldo picked that up, but he probably picked it up prior to the 28th.

(Testimony of Warren W. Anderson.)

He normally tries to get it four or five days before the end of the month, if possible. Seeing as how the 27th would be the last day, he would pick it up before the 31st, and I have no doubt that he came in prior to that Saturday.

Q. Do you have an independent recollection as of now that Mr. Thomas did pick the list up?

A. No, I do not. He may not have picked it up until the 31st.

Q. Was it Mr. Thomas that received that list?

A. Yes.

Q. You personally gave it to him, or can't you recall?

A. I don't exactly recall, but the normal sequence would be that I would give him the list. I would assume that I had.

Trial Examiner: Do you give him a letter with the list?

The Witness: No, I do not.

Trial Examiner: Do you give him the check?

The Witness: The check is issued later.

Q. (By Mr. Scolnik): Do you have any recollection at the present time of giving the list to Mr. Thomas before the end of the month of May?

A. I gave testimony a moment ago that I believe I should correct. I now remember definitely giving Mr. Thomas the list [173] because in this case the Hatfield incident was there, and on the list there was a notation opposite Mr. Hatfield's name, and I remember explaining it to Waldo.

(Testimony of Warren W. Anderson.)

Q. In other words, you now remember that you personally gave the list to him?

A. Yes, and explaining that one notation on the list. There may have been other things explained, but that I remember because there was a notation opposite his name. Of course, I believe he already knew the circumstances at that time.

Q. But you still don't recall whether it was before the end of May or not?

A. I cannot recall the exact date, no.

Q. Now, the next step, as I understand your testimony, is the delivery of the company check for the total amount of dues deducted for that period. Can you recall approximately on what date the check covering the dues deducted on the May 1st to May 15th pay roll was transmitted to the union?

A. There were two checks sent on the May 15th deduction. One of them was sent on the 20th——

Trial Examiner: The 20th of what?

A. (Continuing): The 20th of May, 1955, in the amount of \$23.50, which was a special check, and it covered the deductions of Charles R. Hatfield.

There was another check requested the 3rd of June, to the best of my knowledge. I cannot recall for sure if that is the [174] day Mr. Thomas picked it up or not.

Q. (By Mr. Scolnik): Was it within the first ten days of June?

A. Yes. Only in one instance has it ever been after the 10th since I have been there, and that was

(Testimony of Warren W. Anderson.)

in July when Mr. Thomas was on a vacation and, I believe, he picked it up after the 12th.

Q. Do you have any recollection as to whether it was within the first five days?

A. The check was made out on the 3rd of June, to the best of my recollection. If he picked it up on that day, yes; otherwise it would have been the 6th or 7th.

Q. Do you recall whether you personally gave him the check? A. Yes, I would have.

Q. And that took place in your office?

A. That is right.

Q. Do you recall how the other check, the \$23.50 covering Hatfield's deduction, how that check was transmitted to the union?

A. That was transmitted by mail.

Q. Do you know what happened to that check?

A. Yes. It was returned with a letter of transmittal from Mr. Robert Crimmins, Business Agent of the local union.

Q. Still directing your attention to the month of May, 1955, and the particular pay roll period of the 1st to the 15th, I [175] will ask you if you can relate once more this procedure of the operation of the check off system in your department, with the specific reference to what happened in the cases of Hatfield, Spangle and Thomas?

A. Well, in the cases of Hatfield, Spangle and Thomas, they all signed check off authorizations in that month and paid——

Mr. Halpin: I object to that. The witness al-

(Testimony of Warren W. Anderson.)

ready testified that he has never seen the authorization and has no way of knowing himself whether they signed them or not.

The Witness: I would beg to differ with the attorney. I have access to the books for it if I need it. I have seen these check offs. As a matter of fact, I have them in my file as of this time with me.

Trial Examiner: The objection is overruled.

Q. (By Mr. Scolnik): What I would like you to relate, Mr. Anderson, however, is that I would like you to indicate what happened at the time during the month of May. In other words, possibly you may know now such things that you learned subsequent to May about Hatfield, or anybody else, but I want you to explain what actually happened during the month of May, going back over this check off procedure that you have described in detail already, but indicating how it actually applied, what actually happened to those particular people, Hatfield, Spangle and Thomas, in the preparation and workings of these various documents and forms.

A. Well, the pay sheets were brought down, transmitted from camp to the pay roll department. I received them there the evening of the 16th or the 17th, as I have related previously. In checking these sheets I would have checked them as normal. In the case of Charles Hatfield—I have that before me now—under the asterisk it shows union dues of \$23.50. Spangle and Thomas, I remember since refreshing my memory, there was also \$23.50 opposite their names. The pay roll would have been run

(Testimony of Warren W. Anderson.)

after the checking. We started running the pay roll on the afternoon of the 18th and we completed it the evening of the 19th or the morning of the 20th, checking it out.

Q. When you say "the pay roll was run," are you referring now to this operation whereby these three forms are prepared, the journal, the pay check and the earnings record? A. Yes.

Q. With reference to that particular operation, do you recall whether or not, in the case of Hatfield, Spangle and Thomas, the deduction of \$23.50 was entered on these various forms?

A. Yes, they were run identically the same on the pay roll journal, on the earnings record and on the check. There was no difference between the three. They all had \$23, and they were all run off in a matter of 30 or 40 minutes of each other.

Q. Each of their pay checks showed a deduction of \$23.50 for union initiation fees and dues?

A. Right, in the stub side. [177]

Q. And a corresponding notation was indicated on each of their individual employee earnings record? A. That is right.

Q. And similarly on the pay roll journal?

A. That is right.

Q. I take it that the originals of all of these documents, with the exception of the actual pay check itself, which was sent to the employee, are in your possession?

A. Yes, everything but the stub would be in our possession. [178]

* * * * *

(Testimony of Warren W. Anderson.)

Q. (By Mr. Scolnik): You have pay rolls for various months bound in one volume?

A. They are all bound in one volume—they are filed consecutively.

* * * * *

Q. (By Mr. Scolnik): How many pages cover the woods employees alone for May 1955, to the best of your recollection?

A. I believe there were three sheets.

Q. Do you recall as of now whether or not Spangle, Thomas and Hatfield, their names appear on one sheet?

A. I do not believe they would. I believe Mr. Hatfield is on the first sheet, and Spangle and Thomas would be on the second or third. They are grouped alphabetically and listed [179] alphabetically. I do not exactly recall what the first sheet is. I believe Mr. Hatfield would be on the first, and Thomas and Spangle on the second or third.

Q. Now, with respect to the dues collection list covering May 1 through May 15, do you have the company copy of that list with you?

A. Yes, I do.

Q. Do the names of Hatfield, Spangle and Thomas appear on it? A. They do.

Q. Do you recall what, if any, notations appear after their names?

A. There is \$23.50 after Spangle's name and after Thomas' name. After Hatfield's name——

Q. Would you produce the sheet? [180]

* * * * *

(Testimony of Warren W. Anderson.)

Q. (By Mr. Scolnik): I again hand you, Mr. Anderson, General Counsel's Exhibit 17 for identification and ask if you will state what entries appear after the names of Hatfield, Thomas [181] and Spangle?

A. Opposite the name of Charles Hatfield on our copy it shows \$23.50 deducted, but not entered in the union list.

Q. That is a pencil handwritten notation?

A. Right.

Q. What entry, if any, appears opposite the name of Paul Thomas? A. It shows \$23.50.

Q. And Mr. Spangle? A. \$23.50 also.

Q. Did you personally make any of those entries on General Counsel's Exhibit 17 for identification, which you are holding in your hand?

A. Not of those three entries that are in question now, no.

Q. Do you know who did?

A. Well, yes. It is the handwriting of Fern Haynes, a girl that works in my department, or did work in my department.

Q. Do you know whether or not similar entries appear on the copy of the list which was given to the union, with respect to Mr. Spangle first?

A. Yes. Mr. Spangle would show \$23.50 after his name.

Q. Do you have a recollection as of now that there was a notation of \$23.50 opposite Spangle's name on the copy given to the union?

A. I just saw it on the union copy. I wouldn't

(Testimony of Warren W. Anderson.)

know whether [182] I would have remembered definitely prior to this or not. It should have been.

Q. Do you recall what, if any, notation opposite Hatfield's name was on the union's copy before it was delivered to the union?

A. I wrote some remarks opposite it in regard to, brief remarks, in regard to what had been done with it.

Q. You made an entry in your own handwriting on the union's copy? A. Yes.

Q. Opposite Hatfield's name? A. Yes.

Q. If you had occasion to see that copy now would you be able to identify such notation as being the one which you put on there? A. Yes.

Mr. Scolnik: I will ask Mr. Halpin, and Mr. Crimmings, if they, or either of them, have at the present time in their possession the union copy of this particular list?

Mr. Halpin: I have it in my possession.

Mr. Scolnik: I will ask Mr. Halpin if he would be willing to produce it for me to show to the witness?

Mr. Halpin: No.

Trial Examiner: Can't you stipulate as to what is on the union copy? [183]

Mr. Halpin: I will stipulate that it says "23.50 under separate check," and that there is an "X" beside Charles Hatfield's name in red, but I won't stipulate as to who put it there, or anything else about it.

(Testimony of Warren W. Anderson.)

Mr. Scolnik: I am willing to join in that stipulation.

I wonder if Mr. Halpin would be willing to further stipulate that there are several other additional details after the man's name, namely, that the red pencil "X" appears approximately half an inch directly to the left of Charles Hatfield's name?

Mr. Halpin: Yes.

Mr. Scolnik: Further, that the notation appearing immediately to the right of Hatfield's name is handwriting in pencil, and on two lines, and that there appears in parenthesis on one line "\$23.50 under," and that there appears on the line immediately underneath that the words "separate check"?

Mr. Halpin: I will stipulate to that.

Trial Examiner: And you, Mr. Scolnik?

Mr. Scolnik: I so stipulate.

Trial Examiner: Thank you, gentlemen.

Q. (By Mr. Scolnik): Now, Mr. Anderson, can you state whether or not the actual pay checks for the May 1 to May 15 pay roll period for Mr. Spangle, Mr. Thomas and Mr. Hatfield were issued at the same time?

A. Well, no. I know they were not.

Q. Can you explain the circumstances? [184]

A. Well, Mr. Hatfield was discharged on the 17th. We mailed his check to him earlier than the balance of the woods checks were given out. The woods checks were handed out previous to the 25th of May. I do not know whether they were handed

(Testimony of Warren W. Anderson.)

out previous to the 24th or not. The normal procedure would have been to hand them out on the 24th.

Trial Examiner: Are the checks dated the 25th?

The Witness: They are dated the 24th, the 9th and the 24th of the month normally.

Q. (By Mr. Scolnik): What date was Hatfield's check dated?

A. Mr. Hatfield's check was not on the regular run. If it had been on the regular run it would have normally been May 24.

Q. Do you have any recollection as to when it was actually issued to him?

A. Yes. I have a copy of a letter informing me that the check was mailed to him on the 20th of May. The letter was dated the 20th of May. [185]

* * * * *

Cross Examination

Q. (By Mr. Halpin): Mr. Anderson, on direct examination you testified that a check was given to Charles Hatfield by mail sometime around the 20th of May. Is that correct?

A. The check was mailed on the 20th of May.

Q. And you testified also that the check to Hatfield was made in the same way, and the same manner, as the other checks on the May 1st to 15th pay roll. Is that correct?

A. That is right.

Q. And it was not made in a special way, is that right?

A. Yes.

Q. Now, what did you do with the check after it came out of the machine? [190]

Mr. Scolnik: Which check?

(Testimony of Warren W. Anderson.)

Mr. Halpin: The check for Charles Hatfield for the pay period from May 1 through 15.

A. It remained in the bottom of the machine with the balance of the checks and was taken out on a check of that individual page.

Q. (By Mr. Halpin): Will you explain that?

A. It was handled and checked in the normal method that any other pay sheet would have been handled. After the pay roll was completely checked out, the check was signed, and it was taken in to Mr. Robert Mason.

Q. Did you take that in yourself?

A. Yes.

Q. Were the other checks taken in at the same time? A. I do not recall.

Q. Isn't it true, Mr. Anderson, that you had a special request from Mr. Mason to bring this particular check to him? A. I am not certain.

Q. Could you have?

A. I could have, yes.

Q. Was any memorandum handed to you in the period from May 16 through May 20 concerning the Hatfield matter from any of the other employees of the company, any special memorandum, something out of the routine?

A. No, no memorandum that I know of. [191]

Q. Were any oral instructions given to you by any other employee of the company during that same period relative to the Hatfield matter?

A. Yes.

(Testimony of Warren W. Anderson.)

Q. Who communicated oral instructions to you during that period?

A. Mr. Hood, Mr. Hansen and Mr. Mason, the three that I know definitely.

Q. They all three communicated to you about it during that period? A. Yes.

Q. Who was the first one to talk to you about it?

A. May I ask, when I asked them or when they came to me directly?

Q. Either way. A. Mr. Hood.

Q. Did you ask him something? A. Yes.

Q. When was that?

A. It was the evening of the 16th or sometime the morning of the 17th.

Q. Where did that conversation take place?

A. In Mr. Hood's office.

Q. At the Anderson plant? A. Yes. [192]

Q. Who else was present besides yourself and Mr. Hood? A. No one that I know of.

Q. Could you tell us what the substance of the conversation was?

A. I asked him about the \$23.50 deduction of union dues.

Q. What did you say to him exactly, do you remember?

A. I don't remember exactly. I asked him whether we should deduct it or not.

Q. What did he reply to you?

A. I don't recall for sure.

Q. Do you recall whether the substance of his

(Testimony of Warren W. Anderson.)

reply was that you should deduct it or that you should not deduct it?

A. I do not recall that. I am not sure what he did say.

Q. Now, why was it that you went to ask him whether you should deduct it or not?

A. Well, I had been in on some—I mean, the case was up and the letter had been received from the union, and there was a question in my mind whether we should deduct it or what should be done in the matter.

Q. Now, when you speak of a letter being received from the union, what letter are you talking about?

A. The letter of, well, I believe it is dated—the last letter from the union demanding his discharge.

Q. The letter dated May 13?

A. I don't know the date. I would have to see it.

Trial Examiner: I don't think that one is in evidence. Is the second letter in evidence?

Mr. Halpin: I thought it was.

Trial Examiner: Yes; that is right.

Mr. Scolnik: No. 5.

Q. (By Mr. Halpin): General Counsel's Exhibit No. 5 I am now showing you, and I am asking you if that is a copy of the letter to which you just referred in your oral testimony? If you will wait a minute I will show you another letter—or was it General Counsel's Exhibit No. 4?

Mr. Scolnik: I object, Mr. Examiner, on the ground that it hasn't been shown that the witness

(Testimony of Warren W. Anderson.)

ever saw either of those letters. I don't see how he can be asked to identify it if he has not seen it.

Mr. Halpin: If he can, he can.

A. I saw this (indicating) letter, yes.

Q. (By Mr. Halpin): You are identifying General Counsel's Exhibit No. 4? A. Yes.

Q. And that is the letter dated May 6?

A. Yes.

Q. When did you see that letter?

A. Our Personnel Manager, Mr. Del Smith, brought that in to me, showed it to me.

Q. On what date was that? [194]

A. It was on the 12th or the 13th. I don't remember the exact date.

Q. Either Thursday or Friday, the 12th or 13th of May, is that right? A. Yes.

Q. Was it the fact of having seen that letter that led you to go to see Mr. Hood when you went to make up Mr. Hatfield's pay check?

A. I am not sure whether it was that letter or the second one. At this time I don't remember if I had ever seen the second one until recently.

Q. At any rate, you saw one or the other of them and it was the fact of having seen one or the other that led you to go to see Mr. Hood before you made the deduction?

A. That, and other things, knowing his discharge had been requested.

Q. At the time that you saw Mr. Hood had you received any oral instructions from Mr. Smith, Mr. Del Smith, with respect to whether you should

(Testimony of Warren W. Anderson.)

make the deduction or not? A. No, I hadn't.

Q. Had Mr. Smith discussed this with you in any way at all? A. No.

Q. You say, and correct me if I am wrong, because I want to get this straight, that you are not sure at this time what Mr. Hood's reply was to your question about whether or not you [195] should deduct this \$23.50 from Hatfield's pay check, is that right?

A. That is right. I know he was in contact with attorneys at the time.

Q. Now, after you left his office who did you next discuss this matter with in the company?

A. Walt Hansen, Logging Superintendent.

Q. When was that?

A. Sometime the 17th—no, the 18th.

Q. That was after you had begun to make up the pay roll?

A. Would you broaden that?

Q. Was that after the machine had begun to operate on the May 1st to May 15th pay roll?

A. You mean the machine that would make their checks?

Q. Yes.

A. No. It was prior to that time. It was early in the afternoon or about noon.

Q. Now, did Mr. Hansen give you any instructions respecting the deduction to be made from the Hatfield check?

A. I don't know how to word it.

Q. Take your time.

(Testimony of Warren W. Anderson.)

Trial Examiner: What was the conversation?

A. (Continuing) Well, Charles Hatfield was present. He came in and wanted to see Mr. Hansen. I went in and got Mr. Hansen. Charles Hatfield told me to deduct the dues as he had [196] authorized them, and admit him to the union.

I do not recall if at that time Mr. Hansen made the statement to deduct them or if it was after he had consulted with other people in the Ralph Smith group.

Q. (By Mr. Halpin): At that time I take it Mr. Hatfield had already been discharged, is that right? A. Yes.

Q. So he told you to make these deductions after he had already been discharged?

A. As he had authorized, yes.

Q. Now, who else did you have a conversation with concerning these deductions in that period from the 13th through the 20th of May, 1955?

A. Well, Mr. Mason.

Q. When did that conversation take place?

A. He asked me the amount of it so that he could make a check out for the union.

Q. He asked you the amount of the deductions?

A. Yes.

Q. When was that, Mr. Anderson?

A. The evening of the 19th or the morning of the 20th; I am not sure which.

Q. Had Mr. Hatfield's check already been made out at that time?

(Testimony of Warren W. Anderson.)

A. If it was the morning of the 20th it would have been. [197]

Q. Now, Mr. Anderson, you have testified under direct examination to a pay roll check made out to Charles Hatfield covering the period from May 1st to May 15th. Was there a check made out for the period from May 16 through May 17 for Charles Hatfield? A. No.

Q. No such check was ever made out?

A. That is right.

Q. Was time turned in for that period to you on one of the pay roll deduction slips?

A. Not to my knowledge.

Q. No time was ever turned in?

A. Until I received some time slips here the other day, and in discussion of the case recently, we found out an error had been made and that he had not been paid off.

Q. When was that error discovered?

A. September 22 or 23.

Q. Was the check then issued for Mr. Hatfield to cover that error? A. Not as yet.

Q. One has still not been issued, is that correct?

A. Correct.

Q. Now, on the May 1st to 15th pay roll slip or stub, check stub, I believe it was called, which has been introduced in evidence as General Counsel's Exhibit 18, certain items appear [198] under "Deductions." Is that correct? I am showing you General Counsel's Exhibit 18.

(Testimony of Warren W. Anderson.)

A. You wish to know if these items are correct?

Q. No. I want to know if they appear there—there are a number of deductions there, right?

A. Yes.

Q. Can you tell from looking at that if the deduction has been made for supplies and goods purchased at the company's store? A. Yes.

Q. Which item is that?

A. There is none.

Q. There is none on there? A. Right.

Q. At any time up to the present time has Ralph L. Smith—strike that.

At any time from May 15, 1955 to the present time, has a deduction been made on a check to Charles Hatfield for goods purchased at the company's store during the period May 1st to May 15th, 1955?

A. I do not know when the goods were purchased. I set up an accounts receivable on Mr. Hatfield shortly after his discharge for supplies he owed us for, yes, and it has been deducted.

Q. What was the amount of that accounts receivable?

A. I would have to check the records. [199]

Q. Now, from time to time people are discharged, or leave the Ralph L. Smith Lumber Company, do they not? A. Right.

Q. When they leave, isn't it true, Mr. Anderson, that the accounts receivable due Ralph Smith are always deducted from their check before they leave?

(Testimony of Warren W. Anderson.)

A. No, that is not true.

Q. It is not true?

A. Normally they are, but not always.

Q. How many times since you have been working there has this practice not been followed?

A. Everybody makes errors. I know of two or three cases where we have had to write letters to them.

Q. Two or three cases in the time that you have been there?

A. Yes, and I know of some that are still on the books.

Q. How many?

A. I think seven or eight that I know of.

Q. At the time you made the check which you gave to Hatfield covering the period from May 1 to May 15 were you yourself aware of the fact that he owed money to the company store in the woods?

A. I could not say if I knew as of that date or not.

Q. You are not sure? A. No.

Q. But you could have known then? [200]

A. I could have.

Q. Did you know shortly after that?

A. Yes, when Mr. Johnston turned in an uncollectible.

Q. Is that the first time you knew when he turned in the check book?

A. That is the first time that I knew.

(Testimony of Warren W. Anderson.)

Q. Whatever date he turned it in that would be the date that you knew of it, is that correct?

A. That is right.

Q. Now, do you know of your own knowledge anything about a check which was given to Mr. Hatfield to cover lost wages due to his discharge by the company? A. Yes. I prepared it.

Q. On that check was a deduction made for this amount of money that he owed the company store?

A. No.

Q. At that time you definitely did know that he owed money, didn't you? A. Yes.

Q. So, in effect, at that time you did not exercise your claim of some \$25 and some odd cents, is that correct? A. Yes.

Q. Now, as I understand it, you have at this time recovered back the \$25.60 by deducting it from one of Mr. Hatfield's checks, is that right? [201]

A. If that is the amount, yes.

Q. Whatever it is it has been recovered, is that a fair statement? A. Yes.

Q. Was that done after he returned to work for Ralph Smith? A. Yes. [202]

* * * * *

Mr. Scolnik: On the basis of an off-the-record discussion with counsel I understand that he will join in the following stipulation, namely, that Hatfield, Thomas and Spangle were hired on the 18th, 20th, and 9th of October, 1954, respectively.

Do you so stipulate?

Mr. Halpin: So stipulated.

Trial Examiner: Hired by whom?

Mr. Scolnik: By the Ralph L. Smith Lumber Company.

Trial Examiner: Do you so stipulate, Mr. Scolnik?

Mr. Scolnik: So stipulate. [222]

* * * * *

ERNEST DICKEY

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir? [223]

The Witness: Ernest Dickey.

* * * * *

Direct Examination

Q. (By Mr. Halpin): By whom are you employed at the present time?

A. Ralph L. Smith Lumber Company.

Q. For how long have you been employed by them?

A. I started to work for Ralph L. Smith on the 16th of February, 1948; about seven and one-half years.

Q. What department of the company do you work in? A. I work with the fallers.

Q. Could you tell us whether or not you are a member of the CIO-IWA? A. I am, yes.

Q. And how long have you been a member?

A. I have been a member of the IWA since, I think it was September or October, 1948.

Q. Have you been a member continuously until the present time? [224] A. I have, yes.

(Testimony of Ernest Dickey.)

Q. Mr. Dickey, were you working in the Woods Department of the Ralph L. Smith Lumber Company during the fall of 1954 and the spring of 1955?

A. I was, yes.

Q. Now, in addition to being a member of the union, do you have any office with the union?

A. I have.

Q. What is that office?

A. My status now is First Vice President of Local 433 District 13.

Q. Do you have any other official job with the union?

A. Yes. I am considered as kind of a head job steward of the woods.

Q. Did you hold that last position during the fall of 1954 and the spring of 1955?

A. Yes, I did.

Q. Would you just tell the Trial Examiner briefly what your duties consisted of as a job steward?

A. As a job steward I was, they told me——
Trial Examiner: Who told you?

A. (Continuing) The main local in Anderson—aside from being First Vice President up in the woods, which is 35 or 40 miles from Anderson, they told me it was my duty to watch over the job stewards and see that the membership was kept in line [225] in the way of being signed into the union, and then I charted the Woods meeting, down to crew meetings.

That is just about the tale of the whole thing.

(Testimony of Ernest Dickey.)

Q. (By Mr. Halpin): Mr. Dickey, are you acquainted with a Charles R. Hatfield, do you know Charles R. Hatfield?

A. I was never personally made acquainted with him, but I have contacted Charles R. Hatfield.

Q. When did you first contact him?

A. It was on or about May 5 of 1955.

Q. Had you known him before then, or known who he was before then?

A. I knew him as Hatfield, but, as I said before, I wasn't personally introduced to the man formally.

Trial Examiner: You mean nobody said, "This is Mr. Charles R. Hatfield and this is Mr. Dickey," is that what you mean?

The Witness: That is what I mean.

Q. (By Mr. Halpin): But you knew who he was? A. Yes, I knew him.

Q. Had you had any conversations with him prior or before May 5, 1955? A. I had not.

Q. Now, on May 5, 1955, did you have any conversation with him? A. No conversation.

Q. How did you come to know who he was especially on that [226] day?

A. Well, I had been given notice that he and Spangle and Thomas were due to sign into the union for initiation and dues. On this special date the timber fallers weren't working and I was detailed to work in the rigging. At that time our two job stewards were in the hospital, one for an operation which was industrial, and the other was

(Testimony of Ernest Dickey.)

on the lungs. It was presumed it was cancer at that time.

So I took it upon myself to try to get the boys into the union on that day that I worked with them.

Q. What attempt did you make to get them into the union on that day? Tell us in your own words what you did.

A. I contacted Mr. Spangle and Mr. Thomas on going out that morning on the bus.

Trial Examiner: What morning?

The Witness: The morning, I think it was the 5th, the 4th or the 5th.

A. (Continuing) I gave them the cards, the proper cards, and told them that at lunch time if they would kindly fill those out it would speed up the job of getting them into the union.

So at lunch time I went around and I got Mr. Spangle signed up okay. Mr. Thomas wasn't in sight.

We only have 30 minutes for lunch.

Then I approached Mr. Hatfield. He was sitting in the crew bus eating his lunch. I just walked up to the window [227] where he was sitting by and showed him one of those cards like we use and asked him had he ever signed one of those cards. He took it and looked at it and said, "Yes, I signed one last fall."

I said, "Okay," and that was the only conversation we had.

I just stuck the card in my pocket and went on.

(Testimony of Ernest Dickey.)

Q. (By Mr. Halpin): For the purpose of making the record clear, what type of card was this?

A. It was a blue card for the union.

Trial Examiner: Was that a membership application card?

The Witness: Yes, sir.

Q. (By Mr. Halpin): At that time did you give Mr. Hatfield, or offer to Mr. Hatfield any other card or document to sign?

A. Not at that time, no.

Q. Now, when was the next time you met Mr. Hatfield, or talked to Mr. Hatfield with respect to joining the union?

A. It was on or about May 10.

Q. Where did that take place?

A. Well, it was the evening of the 10th of May after the fallers had quit work. We always quit work earlier than the riggers do. I spent a little time fishing in the Lake. We were working at Arthur Lake at the time. In the meantime the riggers quit and I was told when I got in that evening that Hatfield had been there to sign a card to enter the union. [228]

Trial Examiner: Who told you that?

The Witness: Watson, Harvey Watson was the guy that told me that.

Q. (By Mr. Halpin): What did he tell you?

A. He told me that Charles Hatfield had been up there looking for me to sign into the union and I was away fishing at the time.

Q. Who is Watson?

(Testimony of Ernest Dickey.)

A. Watson is our Recording Secretary at the camp.

I didn't see him that time, but the next time I saw him was on the morning of the 11th. We stopped at our regular stop—I would like to change that. It was on the morning of the 12th. We stopped at our regular stop to pick up the fallers. Our bus goes out first. Charles Hatfield happened to be parked there and he came up to the window where I was, and the window was up. It was cool that morning. He tapped on the window and asked did I have them cards for him to sign that morning.

Before I could give him an answer, well, the bus driver drove on with our crew. They had embarked and we were on our way to work.

However, after we got to the woods, and I started scaling the timber for the fallers, and chokers, and the "Cat" was working near us, and Hatfield came up to where I was working and asked me why didn't I have the cards for him to sign. [229]

I told him that everything was beyond my control at that time and I couldn't let him sign any cards. We had already had our crew meeting at the camp that night.

Trial Examiner: What night?

The Witness: On the night of the 11th. This was the morning of the 12th.

I told him that we had our crew meeting the night before and they had concurred in the action the Business Agent had taken on this. I told him

(Testimony of Ernest Dickey.)

that the regular meeting in Anderson, the main meeting, would be that night and that I would go down with the minutes and have them read and see what I could do about that, which I did.

Of course, they read the minutes and they approved the minutes as read, and I was at my row's end, still out of my reach. It was then in the hands of the body.

Q. (By Mr. Halpin): It was on this occasion, on May 12th, that you told Hatfield there was to be a meeting that night in Anderson?

A. Right.

Trial Examiner: When was the meeting in Anderson?

The Witness: The night of the 12th.

Trial Examiner: It was that night that you spoke to Hatfield and told him that it was out of your hands, that you had had a camp meeting?

The Witness: I told him on the morning of the 12th that [230] it was out of my hands.

Trial Examiner: But the meeting in Anderson didn't take place until that night?

The Witness: That is right, the night of the 12th. That was the morning, shortly after I went to work, in the morning of the 12th that I told him.

Q. (By Mr. Halpin): Would you tell the Trial Examiner what took place, if anything, on May 11th at the camp meeting with respect to Hatfield?

A. Well, of course, it was brought up before the body and there was some talk of it, and the

(Testimony of Ernest Dickey.)

Business Agent explained to him the proceedings he was taking, and he also told him about our union shop clause, the way it read, and inasmuch as Hatfield had told me he had already signed the card, and we couldn't produce any card that he had signed, that we thought he was refusing to join the union.

Trial Examiner: Who is the Business Agent?

The Witness: Robert Crimmins.

Trial Examiner: Did you make any statement at that meeting?

The Witness: I made no statement.

Trial Examiner: Pardon?

The Witness: I made none. My job being that of chairman I had to put it before the body. It is then that we try to let the body handle the affairs.

Trial Examiner: There was a meeting on the 11th at the [231] camp and that is what you are referring to?

The Witness: Yes.

Q. (By Mr. Halpin): Now, Mr. Dickey, did you attend the meeting of May 12th at Anderson?

A. I did.

Q. Did Mr. Hatfield attend that meeting?

A. No, he did not.

Q. When you talked to him on the 12th in the morning had you told him where the meeting was?

A. Yes. We had quite a little conversation. He told me he signed a card about four days after he went to work last fall. I tried to make him remember who signed him up. I knew that Jim Gor-

(Testimony of Ernest Dickey.)

don was the shop steward on what we call the Little Side, and Hugh White was the shop steward on what we call the Big Side. I asked him was it Hugh White by any chance. He said it wasn't him. I said, "Was it Jim Gordon?" He said, no, it wasn't him. He said, "I can't identify the party that signed me up." Then he said, "It could have been you." Well, it wasn't me for sure.

Q. (By Mr. Halpin): In that meeting of May 12th that you had with Mr. Hatfield, or that interview, would you tell us whether or not he made any offer to pay money to you?

A. He did not.

Q. Did he on May 6th?

A. On May 6th, no. [232]

Q. On May 5th?

A. He told me he had already signed up last fall.

Q. After May 12th did you again discuss the matter with Mr. Hatfield?

A. Well, on the morning of May 13th I am pretty sure he did get into the discussion, but I and the Logging Superintendent started it. He came in afterwards.

Q. Who was the Logging Superintendent?

A. Walter Hansen.

Q. Where did this conversation take place?

A. In front of the office at the camp.

Q. What was said by Mr. Hansen and what was said by you?

A. Mr. Hansen and I started to get on the fall-

(Testimony of Ernest Dickey.)

ers' bus, which was waiting for me. He approached me and said, "This is business." I told him "All right." Then he said, "Well, we want to get Hatfield signed into the union." I told him that it was beyond my control, that there was nothing I could do about it. About that time Hatfield stepped into the picture. When I first saw him he was coming from a car that had just parked over close to a big oak tree in front of the office there. He came out around some more cars that were parked there and entered the conversation. He wanted to sign into the union.

I told him just what I told Mr. Hansen. I told him that it was beyond my control and there was nothing that I could do at that time, and for him to talk to the Business Agent. [233]

They were waiting for me impatiently and Mr. Hansen said, "We will write him a letter," and then turned and walked toward the office, and I went on and got on the bus.

Q. Mr. Dickey, did you, or Hugh White, or Jim Gordon, have authority from the union to accept members into the union?

A. Yes, in a way.

Q. Would you tell us in your own words, just what you could do as a shop steward, what your powers were?

A. Well, to my notion the shop steward is supposed to contact the new employees and get them signed into the union. In case that they get a refusal, well, they are supposed to turn it over to

(Testimony of Ernest Dickey.)

the legal authorities, which is the Business Agent's job to enforce the working agreement.

Q. Could you actually induct members into the union?

Mr. Scolnik: I object to that.

Trial Examiner: Doesn't the constitution provide the powers and duties of the shop stewards?

Mr. Halpin: Yes. It would be all right for us to be bound by that.

Trial Examiner: I will sustain the objection.

Q. (By Mr. Halpin): Did anyone other than yourself, and Mr. White and Mr. Gordon, have dues authorization slips, blank ones, in their possession? A. Not that I know of.

Q. Would you tell us whether or not those slips are numbered? [234]

A. They are not that I know of. I never noticed the numbers on them.

Q. How are they distributed to the shop stewards?

A. They are in packs. They are a white sheet and a yellow sheet. We use a carbon. The white sheet goes into the check off in the office and the yellow goes to our files for reference.

Q. Are they in book form, or are they——

A. In book form.

Q. Who has the books in the woods?

A. The job stewards have books and so do I.

Q. Anybody else?

A. No one that I know of. They have no authority to have them.

(Testimony of Ernest Dickey.)

Mr. Halpin: I think that is all.

Trial Examiner: Any questions, Mr. Scolnik?

Mr. Scolnik: A few.

Cross Examination

Q. (By Mr. Scolnik): Mr. Dickey, you were the particular job steward who signed up Mr. Spangle and Mr. Thomas, is that correct?

A. I am.

Q. What you actually did was to fill out a white check off slip and they signed it, is that right?

A. There are two of those cards. There is a check off slip and then there is the card for our files. [235]

Q. There is a white copy of the check off slip and then a yellow one?

A. The yellow one for our files on the check off and there is also a blue card for our files.

Q. The blue card is the application for membership in the union, is that right?

A. That is what I would say, yes.

Q. That card the employee signs, and the job steward who signs him up signs his name as a witness on it too?

A. Supposed to sign his name as a witness, yes.

Q. That is your practice when you sign up someone, isn't it?

A. To the best of my knowledge, yes.

Q. In the case of Mr. Spangle and Mr. Thomas, did they sign their application for membership card in your presence?

(Testimony of Ernest Dickey.)

A. Mr. Thomas did not. Mr. Spangle did.

Q. Did you sign your name on each of their cards?

A. I wouldn't say for sure. That was a long ways back. That was around the 5th, 6th or 4th of May. That is a long time. Sometimes things do slip my memory.

Q. Now, the check off slip that Spangle and Thomas signed was made out by you, is that correct, and did you fill it in? A. Yes.

Q. What did you do with the yellow copy?

A. The yellow copy goes in our files.

Q. What did you do with it? [236]

A. I turned it over to the union in Anderson.

Q. What did you do with the white copy?

A. I gave it to Mr. Johnston, the time keeper.

Q. Do you recall approximately when you gave it to Mr. Johnston?

A. No. I presume I gave it to him that evening when he got in.

Q. Now, I would like to direct your attention to the incident that you have told us about in which Mr. Hansen was present and there was some conversation between you and Mr. Hansen and Mr. Hatfield was there part of the time. You have testified that that particular incident occurred on May 13. Are you sure of that particular date--could it have been May 12?

A. Well, I still stick to May 13.

Q. Do you have any particular reason or basis for believing that it was May 13?

(Testimony of Ernest Dickey.)

A. Not any.

Q. Is it your testimony that it definitely could not have been May 12?

A. Well, just as I said now concerning my witness signature on the blue cards, it could have been a little mistake there, but I will still stick to the 13th.

Q. In other words, it might have been May 12th or May 13th, but your best recollection now is that it was May 13?

A. That is the way I would put it. [237]

Q. Did you find out later on that particular day—we are now talking about the day of that incident where Hansen was in the conversation—did you learn at any time during that day that Jim Gordon had signed up Mr. Hatfield?

A. No, I didn't hear Jim Gordon's name called on that particular day.

Q. Was it sometime after that particular day that you found out that Jim Gordon had signed up Mr. Hatfield? A. Yes.

Q. What would be your best recollection as to when you found out about that?

A. Well, I wouldn't say for sure. It was probably the next day or the day after the next. Jim Gordon was confined to his home, supposed to have been yet, and so I never gave it much thought.

Q. How did you find out about it?

A. That is beyond me. I just don't know what grapevine it came over.

Q. Did Gordon ever tell you? A. No.

(Testimony of Ernest Dickey.)

Q. Did you have a conversation with Mr. Gordon at any time about his signing up Mr. Hatfield?

A. It was that week-end—let me see. Where is that on the calendar?

Trial Examiner: Here is a calendar—take this one. [238]

A. (Continuing) It could have been possible that it was May 14 that I found out about it. Let me see.

Trial Examiner: You have a May calendar in front of you.

A. (Continuing) It was on May 14, I suppose, that I found out that Mr. Gordon had signed up Hatfield for I drove over to his place before I left to go to Chico to go home—I go home each week-end—for the purpose of talking with him concerning the case.

Q. (By Mr. Scolnik): Did you talk to Gordon at that time? A. Yes.

Q. That was in his house?

A. It was in his house.

Q. Who else, if anybody, was present when this conversation took place?

A. The Business Agent was there with me.

Q. Mr. Crimmins? A. Mr. Crimmins.

Q. Would you tell us what was said in that conversation?

A. Well, I left before Mr. Crimmins did. I found out that Jimmy Gordon had signed Hatfield into the union. I told him that it was probably my error that I hadn't had time to contact him

(Testimony of Ernest Dickey.)

concerning the procedure that had been gone through with the body at the meetings. He wasn't aware of the facts that they had went through the channels, you see.

Q. By "he" you mean Jim Gordon? [239]

A. Yes. That he hadn't found out that the body at the crew meeting at the camp had concurred with the Business Agent's actions, and I had taken the minutes to the regular meeting in Anderson on the night of the 12th, and they were approved as read there. He didn't know all of this had been gone through with and it was out of his control at the time.

Q. Is that what you told Jim Gordon, what you explained to him?

A. I told Jim Gordon that the procedure had been set up in a way that it was probably my error that I hadn't already contacted him and told him the whole of the layout.

Q. What did he say?

A. He said he was ignorant of the facts until right then.

Q. What did Mr. Crimmins say, if anything?

A. I don't remember anything Mr. Crimmins said.

Trial Examiner: Did Mr. Crimmins come over to your house and then the two of you went to see Gordon?

The Witness: No.

Trial Examiner: How was it?

The Witness: Mr. Crimmins went over there.

(Testimony of Ernest Dickey.)

He had just got there. The fact is I wasn't even expecting Mr. Crimmins in camp.

Trial Examiner: I thought you said Crimmins came to your house and you went over there together?

The Witness: No. [240]

Trial Examiner: Go ahead.

Q. (By Mr. Scolnik): Now, do you recall that during this time, during this meeting, this conversation——

Trial Examiner: At Gordon's house?

Q. (By Mr. Scolnik): ——at Gordon's house, when you and Crimmins were there, that Mr. Gordon handed, or offered to Mr. Crimmins the yellow copy of the check off slip which Mr. Hatfield had signed?

A. No, I don't recall that. As I say, I only stayed a minute. I was hurrying to get off home. I was late at that time.

Q. You don't deny that that took place, though, do you, Mr. Dickey?

A. I don't know if it took place and I don't remember of anything like that going on in my presence.

Q. You just don't remember. Do you remember Mr. Gordon handing or offering to hand to Mr. Crimmins at that time the application for membership card which you have just described as a blue card, that Hatfield had signed? A. No.

Q. You don't remember that? A. No.

Q. Was that something which might have hap-

(Testimony of Ernest Dickey.)

pened as far as you can recall? A. Pardon?

Q. Is that something which might have happened, but you don't remember now?

A. Well, I am positive it didn't happen while I was there. I was there only a minute. I saw Mr. Crimmins was already in conference with Gordon and so there was nothing that I could do so I went on home.

Q. Do you recall at this same time Mr. Crimmins saying anything at all about receiving a letter from Mr. Hatfield? A. No. [242]

* * * * *

WALTER O. HANSEN

a witness called by and on behalf of the General Counsel, National Labor Relations Board, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, please?

The Witness: Walter O. Hansen.

Trial Examiner: Mr. Hansen, where do you live?

The Witness: Redding.

Trial Examiner: You may be seated.

Mr. Scolnik, you may proceed with the examination of this witness, who has been duly sworn. [243]

Direct Examination

Q. (By Mr. Scolnik): What is your position with the Ralph L. Smith Lumber Company?

A. Logging Superintendent of the Anderson operation.

(Testimony of Walter O. Hansen.)

Q. You have been present at all times during the testimony thus far in this proceeding?

A. Nearly all, sir.

Q. Are you the Mr. Hansen referred to in the testimony? A. Yes, sir.

Q. I take it you know Mr. Charles R. Hatfield?

A. Yes.

Q. Do you know when Mr. Hatfield was discharged by the company in May, 1955?

A. Yes.

Q. When was that?

A. About five minutes past midday, the start of the midday lunch hour on May 17.

Q. Who discharged him? A. I did.

Q. What was your position with the company at that particular time?

A. I was Logging Superintendent. [244]

* * * * *

A. I discharged him upon verbal order of the Vice President and General Manager, Mr. Hood, who acted pursuant to a demand of the local union.

Mr. Halpin: I object to that on the ground of hearsay.

Trial Examiner: That is enough, Mr. Hansen.

Q. (By Mr. Scolnik): When did you get these instructions from Mr. Hood?

A. Approximately 10:30 a.m., May 17.

Q. Where were you at the time? [245]

A. I was riding in my pickup, approaching the camp office, when I heard the radio call for me. I asked that it hold off a bit. I wanted to change

(Testimony of Walter O. Hansen.)

radios. I got in the radio station at the camp office in approximately 15 minutes and took the message from Mr. Hood.

Q. What did the message say?

A. The message was to discharge Mr. Hatfield.

Q. Was that the entire message? A. No.

Q. What was the entire message?

A. In substance the entire message was about as follows: "I have received a second letter demanding the immediate discharge of Mr. Hatfield. The letter was dated May 16. I have consulted counsel. I know how you feel in this matter. I feel that there is no other course to follow and that if Hatfield should choose to make a case out of it I believe the responsibility will rest with the union."

That was about the substance of his message.

Q. You indicated a few minutes ago that you did discharge Hatfield yourself at a certain time on the 17th. Would you state in substance what you said to him at that time?

A. I walked up to the front of the crew bus and, arriving within 50 feet of it, I asked, "Where is Charlie Hatfield?" Someone said "Here he is." I spied him in the bus. I entered the bus. Mr. Hatfield was seated a little toward the rear of [246] the bus. I walked up to him and said, "Charlie Boy, I have a message for you. Pursuant to verbal orders of the General Manager, who is acting according to the demand of the local union, you are hereby dismissed."

(Testimony of Walter O. Hansen.)

Those are very close to the exact words that I used at that time. [247]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Halpin): Mr. Hansen, when did you first become aware of the fact that the union had requested the discharge of Mr. Hatfield?

A. I became aware of it officially—I will have to qualify my answer—on either May 9th or May 10th. I became aware of it through a rumor that their intention was to request the discharge of Hatfield; that the intent of the Business Agent was to request the discharge of Hatfield.

Q. Now, Mr. Hansen, when did you find out that there was more than a rumor to this notion that the union wanted Mr. Hatfield discharged?

A. On either the 9th or 10th in the evening.

Q. How did that take place?

A. First I received a radio call, which I couldn't read. I had been on the west side on the day involved, and Mr. Oscar Clyd, my assistant, was attempting to communicate with me and we gave it up. When I got home I got a message from him to [252] the effect that he had heard that Crimmins had written or was writing a letter demanding the discharge of Charles Hatfield. On that same evening about 8:30 Mr. Hood, the Manager, called me by phone and stated that he had received a letter over Mr. Crimmins' from the union demanding the discharge of Hatfield. I placed that on the 10th.

(Testimony of Walter O. Hansen.)

Q. Did you say anything back to Mr. Hood after he communicated this information to you?

A. What do you mean "back"?

Q. Reply.

A. Yes, I did, as follows. I said, "Well, there is something wrong. I have talked to Mr. Hatfield and Mr. Hatfield expressed to me his willingness to join the union, and also stated that he had believed that he had been signed in, but that if there was anything wrong he would certainly like to take care of it."

Q. When did you talk to Mr. Hatfield?

A. I talked to Mr. Hatfield on May 10, to the best of my recollection, during the noon hour on the landing at Arthur Lake in the crew bus in the front when he was eating lunch with approximately 12 or 14 people.

Q. Isn't it a fact that at that time you told Mr. Hatfield that you knew that the union had written a discharge letter on him?

A. I told Mr. Hatfield that I had heard that his discharge was going to be demanded and there might be some trouble, and [253] I asked him what the situation was. I asked him if he was a conscientious objector to unionism, or joining the union. He said he was not. I suggested that he take care of it. He said, "Well, I am perfectly willing to join the union." He seemed most cooperative. He wasn't hostile, but he was docile.

I turned to members in the bus, crew men in the bus, being union members, and I said, in effect,

(Testimony of Walter O. Hansen.)

“Here is a good man that wants to join your union. Can’t some good union man sign him up?”

At least one man replied, “There is no job steward here. Jim Gordon is sick. Why doesn’t he go to the camp and see Dickey?”

I suggested that he do that.

He told me of his trouble to get to camp. He was riding from Redding with a group of people that didn’t normally go to camp to get to work. He was riding with the group. He said he would make every effort to do so. [254]

* * * * *

Q. Now, after you talked to Mr. Hood, on what you think was the evening of May 10, did you immediately take action to discharge Mr. Hatfield?

A. I did not.

Q. Why not?

A. Because I felt it the moral obligation of an employer to give an employee a chance to answer charges against him.

Q. Did Mr. Hood request that you discharge Mr. Hatfield?

A. Mr. Hood requested that I find out what was wrong, and try to straighten out the situation.

Q. Now, in between the 10th and the 17th, when you actually did discharge Mr. Hatfield, you took no action on the request for his discharge, is that right?

A. That is right.

Q. All that time you knew that the union had demanded the immediate discharge of Mr. Hatfield?

(Testimony of Walter O. Hansen.)

A. I knew it from Mr. Hood. I did not read the letter. He told me of its contents. It was a little later, probably not until the 14th, that I got an opportunity to read the letter that Mr. Hood had described. [255]

* * * * *

Q. Did you discuss the matter at all with Mr. Johnston between the 10th and the 13th?

A. On the 13th Mr. Johnston knew something about it from my action, and from some discussion I had to enter into with respect to what I was doing. I know that was on the 13th. I place that date——

Trial Examiner: That is enough.

The Witness: As you were.

Q. (By Mr. Halpin): Do you want to modify your answer?

A. Yes. I want to modify my answer to the effect that to the best of my recollection Mr. Johnston had information from me concerning that on the 12th.

Q. On the 12th? A. On the 12th.

Q. How did he receive that information on the 12th, what did [257] you tell him?

A. Because I had a conversation with Mr. Ernest Dickey and Mr. Hatfield in the front of the office, and I was very puzzled. I couldn't figure things out. Mr. Dickey had told me that he couldn't sign Mr. Hatfield into the union. I knew Hatfield had been trying to approach Ernest and I said, "Ernest, I would like to get this mess about Hat-

(Testimony of Walter O. Hansen.)

field straightened out. He tells me he would like to join the union."

At that time I didn't know Hatfield was around and he approached us.

Mr. Dickey said, "Well, I can't do anything about it. I haven't anything against this man. I have only seen him twice in my life. I asked him once if he had signed a green card, and he said that he had. I looked on our record book and I found no record of it. At this time it is completely out of my hands. He will have to see the big shots down at Anderson."

I said, "Mr. Dickey, I understand that Charlie Hatfield has been in wanting to join the union, and that he is here now stating that he is willing to join, that he actually wants to join."

Ernest said "Yes, but I can't do anything about it."

It was time for the crew to leave. I said, "Well, gee, I am puzzled. I don't know what to do."

I turned to Hatfield and said, "I don't know what course to take, Hatfield. It won't hurt if you would write me a note [258] stating that you wanted to join the union, and that you are now willing to join," or words to that effect.

With that I went to the camp office and I asked for a pen and pencil and between Herb and myself a pen and pencil were procured, and a piece of paper.

Trial Examiner: "Herb," being Johnston?

The Witness: Johnston, yes.

(Testimony of Walter O. Hansen.)

A. (Continuing): I made sure that Mr. Hatfield had a piece of paper and a ballpoint pen. I first gave him the pencil and then I gave him the ballpoint pen. Then I left about other business.

Shortly thereafter I walked through and I saw Mr. Hatfield writing a letter, writing a note. Later I saw Hatfield get on the crew bus. I had work to do and I went back to the office and I found said note. [259]

* * * * *

A. I would say that I have received, well, I would say the \$20 applied.

Trial Examiner: What amount did he pay you, if anything?

The Witness: \$20 all together. He offered me more money and I chose to put off the payment time. He offered me \$100, Mr. Referee. I asked him to tell me his problem, and what not, and then I said, "If you make a regular monthly payment of \$20 I can get along fine." I suggested that he just give me \$20. At that time he offered me \$100.

Trial Examiner: What time was that, approximately?

The Witness: I would say about the 18th or 20th of July, somewhere in there.

Q. (By Mr. Halpin): Mr. Hatfield is no longer working for the Ralph L. Smith Lumber Company, is that right? A. Right.

Q. At the time he left did you ask that he repay you the balance of this loan?

Mr. Seolnik: Which time he left?

(Testimony of Walter O. Hansen.)

Mr. Halpin: The second time he left.

A. I did not.

Q. (By Mr. Halpin): Did he receive a termination check at that time?

A. He had it in his possession when I talked to him.

Q. You didn't ask him for your \$100 back, is that correct?

A. No. I asked him his plans for payment, repayment. [266]

* * * * *

Q. Now, why was he discharged the second time?

Mr. Scolnik: I object on the ground that it is immaterial.

Trial Examiner: Overruled.

A. For being absent from work because he was in jail on a charge of disturbing the peace, to which he pled guilty. [267]

* * * * *

Redirect Examination

Q. (By Mr. Scolnik): Mr. Hansen, during your testimony on cross examination yesterday afternoon I believe that you replied to counsel's questions that in your conversation with Mr. Hatfield attorneys' fees, or attorneys were mentioned? A. Yes.

Q. And that was the only recollection that you had as of the time you were testifying yesterday of any conversation about attorneys, but you now have an additional recollection of the conversation in which attorneys were mentioned, is that right?

A. Yes. As of the cross examination yesterday,

(Testimony of Walter O. Hansen.)

A. (Continuing): I made sure that Mr. Hatfield had a piece of paper and a ballpoint pen. I first gave him the pencil and then I gave him the ballpoint pen. Then I left about other business.

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A. Yes. As of the cross examination yesterday,

(Testimony of Walter O. Hansen.)

and I do not remember the exact questions or the exact answers, I denied emphatically that I had paid Mr. Hatfield's attorneys' fees. I wish to state that I said to Mr. Hatfield, "I am not a labor attorney. I cannot advise you. I suggest you see a lawyer." In substance that is what I said to Mr. Hatfield.

Q. Is it not also true, Mr. Hansen, that the first time you ever mentioned to me that you remembered saying that to Mr. Hatfield was out in the corridor a few minutes ago?

Mr. Halpin: I object to that on the ground that it is a leading question, Mr. Trial Examiner.

Trial Examiner: Overruled.

A. I don't recall ever discussing that with you. I remember telling you that I never paid Mr. Hatfield, or hired his lawyer. [272]

Q. (By Mr. Scolnik): In the course of this conversation with Mr. Hatfield, did he ask your advice as to what he should do?

A. Yes, he did. I didn't feel I was able to advise him. I didn't know. I very definitely suggested "See your lawyer."

Q. With respect to your testimony about loaning money to Mr. Hatfield, can you state whether or not you have ever loaned, made any loans to any other employees in the woods? A. Yes, I have.

Q. Infrequently or frequently?

A. Oh, quite often, depending on the circumstances. I can recall several that I have made while working on my present job. It is quite frequently

(Testimony of Walter O. Hansen.)

done. Normally there are loans made in cases where I know there is a need, and if a man has my sympathy, and it is a case where it wouldn't be proper to loan company money. I have a certain flexibility in the use of company money. We generally limit to this amounts earned and not yet paid, and that sort of thing. But I have my own personal friends, and my own ideas, and I have loaned money quite frequently. I would say I have almost done it dozens of times during the tenure on this job. I can think of several names and amounts at the moment and the circumstances.

Mr. Scolnik: No further questions.

Trial Examiner: Any cross examination, Mr. Halpin? [273]

* * * * *

ED WATKINS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Halpin): Mr. Watkins, are you an employee of the Ralph L. Smith Lumber Company?

A. Yes, sir. [277]

* * * * *

Q. Yes.

A. Yes. Pardon me. I was thinking of Hatfield. That is right, yes.

Q. You remember him signing up, is that correct?
A. That is right.

(Testimony of Ed Watkins.)

Q. Now, after that incident do you recall whether or not Mr. Thomas and Mr. Hatfield had any conversations which you heard about membership in the union?

A. Well, not exactly a conversation, but I do know that Hatfield, when he would get on the bus, he would as a rule say something about the union. Well, Thomas said, "Did the union catch up with you yet?"

Q. Who said that, was that Thomas or was that Hatfield?

A. Yes. It was just like he was ribbing him or something.

Q. Was that Thomas that said that?

A. Paul Thomas, yes.

Q. Did you hear Hatfield's reply?

A. Pardon me — there are no ladies here, are there?

Q. No.

A. Well, he would say "Fuck the union," or "To hell with the union," or something to that effect. I heard that time and time again.

Q. Who said that? A. Hatfield.

Q. This was after Thomas had signed up in the union? [279]

A. Yes, after Thomas had signed up in the union.

Q. Were all of these conversations after Thomas had signed up?

A. Yes. Walt Spangle signed the same day. He said——

(Testimony of Ed Watkins.)

Trial Examiner: We are talking about the remarks of Mr. Hatfield. When were they made?

The Witness: Well, when he would get on the bus.

Trial Examiner: What month, what day?

The Witness: You have me there. I don't keep track of the days or anything. It was after he had signed up, I know.

Trial Examiner: After who had signed up?

The Witness: Thomas and Walt Spangle. I worked with him.

Trial Examiner: These remarks were made by Hatfield after these two men had signed union application cards?

The Witness: That is right.

Mr. Halpin: That is all.

Trial Examiner: Any further questions, Mr. Scolnik?

Mr. Scolnik: No questions.

Trial Examiner: You are excused, Mr. Watkins. Thank you very much.

(Witness excused.)

Trial Examiner: Mr. Halpin, will you call your next witness?

Mr. Halpin: I would like to call Mr. Del Smith.

* * * * *

JAMES M. GORDON

a witness called by and on behalf of the Respondent, having been first duly sworn, was examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Halpin): Mr. Gordon, for the purposes of clearing the record, are you the Jim Gordon that has been referred to [291] as a job steward at the Ralph L. Smith logging camp?

A. I am.

Q. You have been here during the entire hearing, have you not? A. I have.

Q. Have you heard the testimony of Mr. Johnston? A. I have.

Q. Would you tell us when you came back to work after being sick in May?

A. I went back to work on May the 21st.

Q. When did you first come back to the logging camp?

A. I came back, well, I was released from the hospital on May 12th. I came back that evening.

Q. Are you a job steward for the union?

A. I am a job steward for the union.

Trial Examiner: Do you hold any other office in the union?

The Witness: No, I don't.

Trial Examiner: Did you hold any in May of 1955?

The Witness: No, I didn't.

Q. (By Mr. Halpin): Prior to May 12th had you been away from the logging camp?

(Testimony of James M. Gordon.)

A. On May 2nd I was injured and Mr. Johnston took me to the hospital that evening, and I was there, the doctor kept me in the hospital until May 12th.

Q. Would you tell us whether or not you had any conversations with Mr. Johnston on the 13th with respect to the Hatfield [292] matter?

A. I did.

Q. Will you tell us whether or not you received any information about the Hatfield matter before May 13th from anybody other than Mr. Johnston?

A. No, I had not—well, yes. On May 2nd at lunch Walter Spangle came to me and asked me if I was going to sign up those three fellows out there in the woods.

I said, "What three fellows?"

He said, "There is three of us out here that didn't sign up last fall."

I said, "I will bring out the application cards and check off slips in the morning and do it."

That afternoon I was hurt and, therefore, I went to the hospital and I was unable to do so.

Q. Other than that information about the Hatfield matter, did you hear any other information except what Mr. Johnston told you on the 13th?

A. No; that is all.

Q. Now, would you tell us whether or not Mr. Hatfield signed more than one authorization card or slip for check off dues and initiation fees?

A. Yes. He signed two check off slips the 13th of May for me.

(Testimony of James M. Gordon.)

Q. Where did he sign the first one? [293]

A. Out in the woods.

Q. Where did he sign the second one?

A. Well, he came over to my house that afternoon, I should judge, about between 2:00 and 3:00 o'clock. I was laying down resting. He said that he wanted, well, didn't think that he was getting a fair shake because of paying back dues, that the others weren't doing it.

I said, "Good enough. Make out another one and tear up the other one if you want to do so."

So I got my check off book and I made out another one and I asked Mr. Johnston, I said, "Now, to be safe"—

Trial Examiner: Where did this conversation take place?

The Witness: This conversation took place over at my home.

Trial Examiner: Was Johnston over there?

The Witness: No. Johnston wasn't there. So we went over to the logging office.

Trial Examiner: You and Hatfield?

The Witness: Yes. We went to the logging office.

Mr. Scolnik: You mean Johnston's office?

The Witness: Yes.

I made out another slip for one month's dues and initiation fee, and I asked Mr. Johnston to give me the old check off slip and I tore it up and put it in the wastebasket.

Q. (By Mr. Halpin): Where did you make out

(Testimony of James M. Gordon.)

the second authorization, in your house or in the logging office? [294]

* * * * *

A. Well, I took my check off book, after talking to Hatfield over at my house, and we went over and I made out another check off slip in the office, and I told Hatfield at the time, I said, "In order to save any difficulty on the other one, we will tear it up."

I asked Mr. Johnston for the other one. I tore it up and threw it in the wastebasket.

Q. (By Mr. Halpin): Was Johnston present at the conversation in your home?

A. No, he wasn't.

* * * * *

Cross Examination

Q. (By Mr. Scolnik): Mr. Gordon, at the time that you prepared the first check off slip that Hatfield signed on the 13th, you [295] also prepared and he signed an application for membership card, isn't that correct? A. That is right.

Q. I will hand you General Counsel's Exhibit No. 12 and ask you to examine it.

A. That is the one I filled out. Mr. Hatfield signed it.

Q. Except for Mr. Hatfield's signature at the lower right hand on the card, is the rest of the ink written material on the card in your handwriting?

A. Yes, it is.

Q. Now, at the time that you prepared the second check off slip that Mr. Hatfield signed on

(Testimony of James M. Gordon.)

the 13th, a carbon copy on a yellow check off slip was also made out at the same time, is that correct? A. Right.

Mr. Scolnik: I will ask the reporter to mark for identification a yellow slip, as General Counsel's Exhibit No. 20.

(Thereupon the document above referred to was marked General Counsel's Exhibit No. 20 for identification.)

Q. (By Mr. Scolnik): I hand you General Counsel's Exhibit No. 20. Can you identify that as the yellow copy of that check off slip?

A. Yes, that is the yellow copy of the check off slip.

Q. These events occurred on the 13th. Is it not a fact that [296] within a few days following the 13th you saw Mr. Crimmins?

A. That is right.

Q. And told Mr. Crimmins what you had done in signing up Mr. Hatfield, is that correct?

A. That is right. I told him that I had signed him up.

Q. And showed him, as a matter of fact, General Counsel's Exhibit 12 and General Counsel's Exhibit 20 for identification?

A. I did. It was in my home.

Q. Do you recall what day that was, Mr. Gordon, either definitely or approximately?

A. That was on the 13th of May. It was on Saturday.

Q. Isn't it also true, Mr. Gordon, that at that

(Testimony of James M. Gordon.)

particular time you offered to hand over to Mr. Crimmins General Counsel's Exhibit 12 and General Counsel's Exhibit 20 for identification?

A. I did.

Q. What did Mr. Crimmins do, did he accept them?

A. No. He told me to keep them for a while.

* * * * *

Q. (By Mr. Scolnik): Would you tell us, to the best of your [297] recollection, what Mr. Crimmins said?

A. I don't remember just what he did say.

Q. Did Mr. Crimmins tell you that you should not have signed Hatfield up?

A. To the best of my knowledge he said he wished I hadn't done it.

Q. Did he say why he wished you hadn't done it?

A. He said that he had asked for the dismissal of Mr. Hatfield.

Q. (By Trial Examiner): Did he make any comment about Hatfield at all except what you have just told us?

A. I don't remember of any comment.

Q. Did he like Hatfield, or not like Hatfield, anything like that?

A. No, he never made any remarks about not liking Hatfield.

Q. What is your duty as a job steward?

A. I am supposed to sign up the new men as they come to work, sign them up into the union.

(Testimony of James M. Gordon.)

I try to do that on about the second or third week after they are there, because I let the boys get a pay check and then I sign them up. I haven't seen a logger yet that hit a new job that had any money. I let them get a few dollars ahead and then I sign them up.

Q. Have you got any other duties except signing up new members?

A. Well, I have collected union dues, and I have sat in on negotiating committees.

Q. Negotiating contracts with the company?

A. Yes.

Q. With the company officials? A. Yes.

Q. Now, when you get a membership application for your union signed by new employees, or employees who have recently been hired, and a dues check off, what do you do with those?

A. There is a white original and I turn that in to Mr. Johnston at the office.

Q. That is the check off?

A. That is the check off. With respect to the blue application card, I turn that over to Mr. Dickey or Mr. Crimmins.

Q. Did you ever attempt to give that Hatfield application card to Mr. Dickey?

A. No, because I never saw Mr. Dickey until Mr. Crimmins was there and I handed it to Mr. Crimmins.

Q. Was Dickey there when you offered it to Mr. Crimmins? A. Yes, he was. [299]

* * * * *

(Testimony of James M. Gordon.)

Trial Examiner: When you say you collect dues, do you also collect initiation fees?

The Witness: I have never collected any initiation fees because the boys always sign the check off slips. [300]

* * * * *

Q. (By Mr. Scolnik): Getting back to May 13, Mr. Gordon, do you recall that at the time you signed Hatfield up both you and Hatfield also signed a letter, which was addressed to the company and indicating on the letter that a copy was to be sent to Mr. Crimmins and Mr. Hood?

A. I witnessed such letter.

Q. I hand you General Counsel's Exhibit 10 and ask you to examine it and state whether you can identify that as being a copy of the letter which you have just referred to?

A. (Examining letter.)

Trial Examiner: You have the original there. Why don't you show him the original?

Q. (By Mr. Scolnik): I am now handing to you, Mr. Gordon, a document, which is the original of that letter, General [301] Counsel's Exhibit No. 10.

A. This is the letter that I witnessed Mr. Hatfield's signature to.

Q. This letter has the name "James Gordon" written on it in ink, is that correct?

A. That is correct.

Q. This is your signature? A. Yes.

Q. And you wrote it? A. I wrote it.

(Testimony of James M. Gordon.)

Q. Now, directing your attention to your meeting and conversation with Mr. Crimmins in your home on May 14, that you were testifying about a little while ago, do you recall whether or not during the course of the conversation Mr. Crimmins mentioned whether or not he had received that letter, General Counsel's Exhibit No. 10, that you just looked at, or a copy of it?

A. I think that while he was there he said he received it.

Q. Do you recall that he said he received it?

A. Yes. He had the letter with him.

Q. Do you know why Mr. Spangle and Mr. Thomas didn't sign check offs before the end of the season in the fall of 1954?

A. They told me that Mr. Crimmins had told them it was so close to the end of the season that he would let them go until they opened up in the spring. [302]

* * * * *

Redirect Examination

Q. (By Mr. Halpin): If you had known on May 13 that a discharge letter had been written on Hatfield would you have signed him up?

Mr. Scolnik: I object to that.

Trial Examiner: Overruled.

A. I probably wouldn't have.

Mr. Halpin: That is all. [303]

* * * * *

ROBERT P. CRIMMINS

a witness called by and on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

Trial Examiner: What is your name, sir?

The Witness: Robert P. Crimmins.

Trial Examiner: Where do you live, Mr. Crimmins?

The Witness: Anderson, California.

Trial Examiner: You may be seated.

I didn't ask you to spell your name because it has been mentioned so often in the record, and we have your signature on a lot of letters.

Mr. Halpin, you may proceed with the examination of the witness, who has been duly sworn.

Direct Examination

Q. (By Mr. Halpin): Would you give us your occupation at the present time, Mr. Crimmins?

A. I am the Business Agent of the IWA Local 13-433, Anderson, California.

Q. How long have you held that job?

A. I have been on that job since January 15, 1954.

Q. Mr. Crimmins, are you the author of the letter dated May 6 to the Ralph L. Smith Lumber Company, and introduced in evidence here as General Counsel's Exhibit No. 4? I will [304] show you the original of that letter.

A. That is correct.

Q. When was that letter sent to the Ralph L. Smith Lumber Company?

(Testimony of Robert P. Crimmins.)

A. The letter was mailed by me the evening or late afternoon of May 6.

Q. Prior to the mailing of that letter had you been to the woods?

A. Yes, I had. You mean right at that particular time?

Q. Yes. A. Yes, I had.

Q. When did you go up to the woods?

A. My recollection is that it was on the evening of the 5th, the afternoon of the 5th.

Trial Examiner: Of May?

The Witness: Of May.

Q. (By Mr. Halpin): When you were up there did you have any discussion with any of the job stewards?

A. I had a discussion with Ernest Dickey.

Q. Would you tell us just what that discussion consisted of?

A. Ernest Dickey, a little prior to that, had received a list from me of the people in the woods to be signed up, and he informed me that he had signed Walter Spangle, Paul Thomas, but that he had contacted Mr. Hatfield and asked him to sign a card and Hatfield told him that he had already signed a card [305] last fall and did not want to accept the card, and Dickey said he didn't stay and argue with him but left.

Q. After that conversation did you talk with any of the company employees while you were at the woods?

(Testimony of Robert P. Crimmins.)

A. I remember having a conversation with Mr. Johnston.

Q. Would you tell us as near as you can what you said and what he said in that conversation?

A. Well, I had inquired of him as to how Walter Hansen received his mail and what was the quickest way to get a letter to him. It seemed quite inconsistent as to just what was the fastest way to get a letter to him. He inquired as to what my purpose was and I told him that I intended to request of the company the discharge of Mr. Hatfield for not joining the union.

Q. What did Mr. Johnston reply to that, if anything?

A. He didn't have too much to say, but he was interested in knowing what it was all about. He thought I was being hard on people, and so on and so forth, in insisting on such procedure and just left me with the impression "Well, go ahead and do it if you want to." That is the impression I got from my talk with Mr. Johnston.

Q. After your discussion with Mr. Johnston you returned to Anderson, is that correct?

A. That is correct.

Q. Did you, during the week from May 9th to May 13th, have [306] any discussions with Mr. Hood on the Hatfield matter?

A. No, I did not.

Q. Did you have any discussion with Mr. Hansen?

A. Yes, I did.

Q. When did that discussion take place?

(Testimony of Robert P. Crimmins.)

A. That discussion occurred in Mr. Hansen's office, at his request, on the morning of May 11th.

Q. Where was that office, for the purposes of the record?

A. In the main office building of the Ralph L. Smith Lumber Company. It is an office that Mr. Hansen seemingly shares with Mr. Parker there in the office.

Trial Examiner: When did you say this took place?

The Witness: The morning of May 11th.

Mr. Scolnik: Was this in Anderson?

The Witness: Yes.

Q. (By Mr. Halpin): Now, who else was present in that conversation?

A. During the most part of the conversation there was no one there. At one time during the conversation Robert Mason, the Secretary-Treasurer of the company, came in.

Q. What was said during that conversation by you and by Mr. Hansen?

A. First of all, if I may I would like to start from beginning.

Mr. Scolnik: I object. [307]

Trial Examiner: Beginning of what?

The Witness: Of my presence in the office of the Ralph L. Smith Lumber Company.

Trial Examiner: You were asked to give a conversation. Will you answer the question, please?

A. (Continuing) Mr. Hansen stepped out and

(Testimony of Robert P. Crimmins.)

called me and asked me if I would come into his office while I was talking to Del Smith. I told him as soon as I got through I would.

I went in and talked with Mr. Hansen. The first part of our conversation concerned a member by the name of Hugh White who, at the time, was in the hospital in Oakland for a lung operation, and we were taking up a collection for him. Mr. Hansen and myself talked about Hugh and his troubles for some time, and we were both quite concerned about him.

When we finished that conversation Mr. Hansen said to me, "Now, Bob, this man, Hatfield, that you are concerned about up in the woods, I will have him in the union very shortly." Then he said, "Well, I don't know whether I will have him in the union or not, but at least I will have him paying dues."

It took me kind of by surprise and I asked Mr. Hansen if he had read the letter that I had written to Mr. Hood on May 6. He told me that he had. I said, "Well, Walter, if you don't remember what it said you should get it from Mr. Hood's file and reread it because I did not, in that letter, request that you get the man in the union. I requested his immediate [308] discharge under the union shop clause in the contract."

The conversation that took place from then on, it evidently made Mr. Hansen quite angry——

* * * * * [309]

Q. (By Mr. Halpin): Now, Mr. Crimmins, after

(Testimony of Robert P. Crimmins.)

that morning did you go to the woods again before May 14?

A. I went to the woods on that very same day, the afternoon of the 11th of May.

Q. Who did you see up there as representatives of the union?

A. As representatives of the union I seen Mr. Dickey, who is [311] the head job steward and crew chairman, and Mr. Watson, who is Recording Secretary of the camp crew.

Q. Can you tell us whether or not you informed them of the discharge letter which had been written on Hatfield?

A. That is correct. In fact, Mr. Dickey had been informed that I was going to write the letter prior to that time. I informed him that the letter had been written at that time.

Q. While you were up there was there a meeting called of the woods crew?

A. Their regular meeting, which is held on the second Wednesday of each month prior to our regular meeting in the union hall in Anderson, was held and I attended it.

Q. Was the Hatfield case discussed at that meeting?

A. The Hatfield case was discussed at that meeting.

Q. Was Jim Gordon at the meeting?

A. No. Jim Gordon was still in the hospital with his injury.

Q. Did the body take action on the Hatfield

(Testimony of Robert P. Crimmins.)

case at that meeting? A. They did.

Q. What action did they take?

A. After I had made the report to them, and explained to them the length of time involved, and what had taken place in the Hatfield case, there was a motion made from the floor to support fully the action taken by the Business Agent in the Hatfield case, or words to that effect. [312]

Q. Was that motion passed?

A. That motion was passed by the group unanimously.

Q. Now, did you stay in the woods that night, or did you return to Anderson?

A. After the meeting I returned to Anderson.

Q. When was the next time you went to the woods?

A. The next time I went to the woods was on Saturday, the 14th.

Q. At that time had you received the letter we have been talking about, known as the nunc pro tunc letter?

A. I had. I received that letter in the Saturday morning mail in the Anderson post office. I took it back to the office, opened it and read it, and shortly after that left for the woods to see Mr. Gordon to find out what had happened.

Mr. Halpin: That is General Counsel's Exhibit 15, for the purposes of the record.

Q. (By Mr. Halpin): Would you tell us, just briefly what the duties of the job stewards are in the woods?

(Testimony of Robert P. Crimmins.)

A. The duties of the job stewards in the woods consist, for one part, of signing up new employees. We advise that they contact the men as soon as possible after they come to work, bearing in mind that the men have the full 30 days, if they want it, and if necessary to wait the 30 days, and after they have had their talk with the men, and then insist that he join the union, that is, apply for membership in the union. The [313] shop stewards, in signing a man up, have an application for membership form filled out, and also a check off of dues form filled out, unless the man would want to pay his initiation fee and dues in cash. The man is not actually received into the union until the membership card is placed in the hands of the union and proper action taken on it at a regularly constituted meeting.

Along with those duties the shop steward, of course, is to look after the welfare of the people in his department, or in that part of the section that he has of the job that he has jurisdiction over, to the extent of taking up any grievances they might have with the boss, and checking on the facts and things concerning grievances, to see if they have a case out of it. They are also instructed that if it is something that is beyond them that they are to call in the Business Agent, or possibly the Grievance Committee, and so on and so forth.

Q. Could you tell us whether or not you furnished to the job stewards in the woods any list of employees who might possibly be considered new

(Testimony of Robert P. Crimmins.)

employees and subject to joining the union?

A. That is correct. We have what we term an entering and leaving list that we receive from the company. I negotiated with Mr. Smith, the Personnel Manager, on that for a while after I first came over here, and he agreed it would be a good thing, and they have been sending us since that time an entering [314] and leaving list.

The entering list shows all of the people that have been hired, what department they have been hired in, their seniority date, and their classification.

Right on the next sheet is what we call the leaving list. It shows all of those people that have been terminated. When we first started out the the reason for the termination was on there. For some reason they don't give us those reasons any longer. They just put down that the man has been terminated, and we don't have any way of telling whether he quit, got fired, or what happened to him.

Upon receipt of that list, which we may receive anywhere from the 4th and it has come in as late as the 10th when Mr. Smith had a new girl in the office to break in and they had trouble getting it out, I turn that over to our Financial Secretary, and the membership record is checked, a master sheet of all of the people that have not been signed up in the union, with their seniority dates, date of hire, and their department is made up. Then there are sheets made up for each department of the people in each shop steward's department that have

(Testimony of Robert P. Crimmins.)

not been signed up, with their seniority date on there. Those sheets are turned over to me, and by me to the shop stewards, and they are supposed to work from that sheet, contact these people and sign up their application card and their check off of dues, or accept the initiation fee and the first [315] month's dues in cash.

Q. Was such a list furnished to Mr. Gordon between May 1st and May 12th, 1955?

A. No, it was not. The list was furnished to Mr. Dickey after Mr. Gordon had already been injured.

Q. Now, when was the first time that Mr. Hatfield's name appeared on one of those lists?

A. His name first appeared on the list that we received in November of 1954.

Q. Was Mr. Spangle's name on that list?

A. Yes.

Q. Was Mr. Thomas'? A. Yes.

Q. Were there other names on that list of people working in the Woods Department?

A. I believe there was a man on that list by the name of Geiger, and I believe he was employed right along at the end of October. I have the record. It was around the 27th, some place in there.

Q. Pursuant to that list, did you talk with Spangle, Thomas and Hatfield in the fall of 1954?

A. Yes, I did, to my best recollection.

Q. Would you tell us the circumstances of that talk?

A. I went up to the log landing and attempted

(Testimony of Robert P. Crimmins.)

to sign these people up in the union. They all told me the same story— [316] “Jesus, here it is getting ready to snow, the snow is practically flying. Are we going to have to pay this initiation fee and dues out of this last check that we are getting from the company? Winter is coming on and Christmas is coming on. We have only been working a little while. We don’t have any money.”

We thought it over, and talked with them, and I finally told them this: “I don’t think that the local union is that hungry for money. I think that you should consider that you have your 30 days in and if you come back in the spring, in line with your seniority, sign up in the union.”

Now, there is some controversy, of course——

Trial Examiner: Just a moment, now. Just answer the question.

Q. (By Mr. Halpin): Is that the substance of your conversation with these three men in the fall of 1954? A. That is correct.

Q. Did you have Hatfield’s name on this particular list at the time you went up there?

A. I had all three of those names on the list, Hatfield, Thomas and Spangle.

Q. Did any one of the three sign a blue application card at that time?

A. No. There were no cards signed.

Q. You are absolutely sure of that?

A. That is correct. [317]

Q. Was there anything signed which anyone could mistake for a blue application card?

(Testimony of Robert P. Crimmins.)

A. No, because I don't have any other thing that I asked these people to sign. [318]

* * * * *

A. (Continuing): During our conversation I explained to Mr. Hansen of the break we had given these people up in the woods, Hatfield, Thomas and Spangle, on that 30 days; that they didn't want the initiation fee and dues taken out of their termination [319] check, and we had given them this break.

Mr. Hansen told me at the time, "Yes, I know that. Hatfield repeated that to me."

That is something I left out of my previous statement.

Q. (By Mr. Halpin): That was the conversation on May 11, to clear the record?

A. Yes. [320]

* * * * *

Q. Mr. Crimmins, would you tell us whether or not Mr. Hatfield ever approached you personally and asked to join the union? [322]

A. No, he did not.

Trial Examiner: Did you ever ask Hatfield, except in November, to join the union?

The Witness: I did not.

Trial Examiner: Did you ever speak to Hatfield in the month of May 1955?

The Witness: No, I did not.

* * * * *

Q. (By Mr. Halpin): Did the union have a meeting in Anderson [323] on May 12th?

A. Yes, they did.

(Testimony of Robert P. Crimmins.)

Q. Was the Hatfield matter discussed at that meeting?

A. The minutes from the crew meeting in the woods of the previous night, May 11, were brought down to the Anderson local union meeting by Ernest Dickey. They were read at that meeting. The local union at Anderson accepted them, by a motion across the floor, as read, and supported the Woods position on the Business Agent's procedure in the Hatfield case.

Q. Was Mr. Hatfield at that meeting?

A. No, he was not.

Q. Was Mr. Gordon at that meeting?

A. No, he was not.

* * * * *

Cross Examination

Q. (By Mr. Scolnik): Mr. Crimmins, as of May 6, 1955, had you personally received any report from any of the local union officials, or job stewards, with respect to Hatfield's feeling [324] about the union, or joining the union?

A. That is correct. I had received a report from Mr. Dickey on the evening of May 5.

Q. What was that report?

A. The report was that he had signed up the other two men, Spangle and Thomas, that he had contacted Mr. Hatfield and that he just said, "I signed one of those things last year," and wouldn't have anything to do with him, so he gave up and went on about his business and turned it over to me.

(Testimony of Robert P. Crimmins.)

Q. At any time prior to May 6 of this year did any union job steward or official relate to you specifically any alleged anti-union statements that Hatfield had allegedly made?

A. Well, I had some union members tell me about those. In Mr. Dickey's case, he was not in contact with him. He reported alleged statements to me that were made by Mr. Hatfield, but that would only be hearsay on Mr. Dickey's part and hearsay on my part.

Trial Examiner: What did Dickey tell you?

The Witness: Well, he told me that some of the boys up there had told him that Hatfield took a very decided position, if the union was mentioned, against the union, and used quite a bit of foul language, and just acted like he didn't have any desire to join, and if he was able to keep from it he was going to do so.

Trial Examiner: What did the member state Hatfield said? [325]

The Witness: It was the same thing that you heard, that is, one of the remarks this morning. I don't like to repeat that kind of language in the record if I don't have to.

Trial Examiner: You don't have to.

The Witness: There were several of them up there that told me that his attitude toward the union was very bitter, that he didn't have any desire to join the union, and made obnoxious remarks whenever it was mentioned.

Q. (By Mr. Scolnik): Do I understand you cor-

(Testimony of Robert P. Crimmins.)

rectly that you don't know whether this is true, but this is what some of the members and job stewards have told you? A. You asked me——

Trial Examiner: Just answer the question.

A. It is purely hearsay, as I said.

Q. (By Mr. Scolnik): Did any of the job stewards, or union members, at any of the times when they made these reports to you, indicate how they felt about Hatfield?

A. All of them that talked to me indicated that they felt the man should either be in the union, or invoke the union shop clause in the contract.

Q. Did any of them ever express their dissatisfaction with these alleged statements of Hatfield?

A. Yes.

Q. Many times?

A. Well, I don't see them many times. I am only up there [326] once a week.

Q. Approximately how many times prior to May 6?

A. Well, on the evening of the 5th I talked to a good number of people up there and, in fact, I circulated around and talked to them.

Q. By "people" you mean union members?

A. Yes. They live there in camp. We would go in their cabins and sit down and talk with them and asked what they thought about it. I had quite a few of those statements made at that time, on the night of May 5th.

Q. Now, if I understand your testimony correctly, Mr. Crimmins, you are not denying that the

(Testimony of Robert P. Crimmins.)

union caused the discharge of Mr. Hatfield, are you?

Mr. Halpin: I object on the ground that it calls for a legal conclusion.

Trial Examiner: Overruled.

A. I will only admit that the union requested the discharge, with the desire that it be carried out by the company.

Q. (By Mr. Scolnik): Both by your letter of May 6th, which is General Counsel's Exhibit 4, and your letter of May 16, which is General Counsel's Exhibit 5, is that correct? Would you like to see those documents that I refer to? A. Yes.

Q. Certainly.

A. I am completely familiar with the May 6th letter and also [327] the other one.

Q. General Counsel's Exhibit 4 is the May 6th letter? A. Yes.

Q. And the May 16th letter, which I referred to is General Counsel's Exhibit 5? A. Yes.

Mr. Scolnik: Let the record show that I have shown the documents to the witness.

The Witness: If I may, I would like to point out that in this letter of May 16 I called to the attention of Mr. Hood that I had requested the discharge of Mr. Hatfield in a letter dated May 6 and that up to the present time that request had not been carried out by the Logging Superintendent.

I also mentioned the fact that I had received a typewritten copy of a letter on May——

Trial Examiner: We know what is in the letter.

(Testimony of Robert P. Crimmins.)

Mr. Scolnik: The letter is in the record.

The Witness: I see. I don't see any place where there was a direct request for discharge here. However, that is one thing that the letter meant. I certainly meant it to be that—if you will read the last part there.

Q. (By Mr. Scolnik): In other words, your testimony now is that your intention in sending the May 16 letter was to make a second request for the discharge of Mr. Hatfield?

A. My intention of the second letter was to get my request [328] of May 6 carried out as requested.

Q. Now, can you recall how many other employees of the Ralph L. Smith Lumber Company were requested to be discharged by the union pursuant to the union shop contract, between approximately 1950, when the contract was first put into effect, and up until May 1955?

Mr. Halpin: Just a moment. He has already testified that he became Business Agent in 1954.

Trial Examiner: As far as you know.

A. As far as I know—I believe I would have to check the records. I don't believe it was a direct request for discharge, but I wrote a letter concerning one Lester Breshears—B-r-e-s-h-e-a-r-s—and there were two others that I believe were either mentioned in that letter or in another letter.

Q. (By Mr. Scolnik): This was approximately when, to the best of your recollection?

A. That was back in April of 1954.

(Testimony of Robert P. Crimmins.)

Q. Do you recall whether or not Mr. Breshears was discharged as a result of that letter?

A. No, he was not.

Q. Do you know what happened?

A. He signed up in the union.

Q. When? A. Shortly after that.

Trial Examiner: What was the substance of the letter? [329]

The Witness: Well, the substance of the letter was a request to get these people in the union.

Mr. Hearing Officer, there is quite a long story connected with that. I can make it brief.

Trial Examiner: I don't want the story. I want the substance of the letter.

The Witness: I think that I have a copy of it. I don't have my copy with me, but the substance of the letter was that I wanted the man to join the union, or we would have to request his discharge, something to that effect.

Trial Examiner: You notified the company that this man had not complied with the union security clause of the contract?

The Witness: Correct.

Trial Examiner: And that if he didn't do so within a specified time that you would ask his discharge?

The Witness: I don't remember whether I had that in there or not.

Trial Examiner: All right.

What other men were mentioned in that letter?

The Witness: I remember making a similar re-

(Testimony of Robert P. Crimmins.)

quest with respect to two other men, but I can't recall whether it was in the same letter or not.

Q. (By Mr. Scolnik): Were those other two people discharged? A. No.

Q. What happened in their case? [330]

A. I believe they quit. I know they left the employ of the company.

Q. You talked to Mr. Dickey on May 5th and he told you about asking Hatfield if he would sign a card, and Hatfield replying that he had already signed one. Do you recall whether the statement was made, or the statement attributed by Dickey to Hatfield, was made that Hatfield said he thought he had already signed one, or he had already signed one?

A. He didn't say he thought he had already signed one. The report made to me was that he said that he had already signed up and he didn't want nothing to do with it.

Q. The following day you wrote the May 6 letter, which is General Counsel's Exhibit 4?

A. That is correct.

Q. In between the report from Mr. Dickey and the time that you wrote General Counsel's Exhibit 4, what investigation did you make of the statement attributed to Hatfield that he had signed up previously?

A. I investigated the company files, the transmittals that came down from the woods, the shop stewards' reports, transmittal sheets that came down from the woods with the people's names on

(Testimony of Robert P. Crimmins.)

them that signed cards, and so on and so forth. I investigated all of the files in the office.

Q. Which office?

A. Mine and the Financial Secretary's, concerning anything [331] that we had in there on union membership. There were no cards received. There were no cards of any kind in the files. The only record I found in the file was that he was overdue.

Q. And before you wrote General Counsel's Exhibit 4, and after you had ascertained the situation, did you tell Dickey what you had found out?

A. I didn't before I wrote the letter, no, because I didn't see Mr. Dickey any more.

Q. You didn't tell Hatfield what you had investigated and found out before you wrote General Counsel's Exhibit No. 4, did you?

A. No, I did not.

Q. Now, Spangle, Thomas and Hatfield had all been employed over 30 days by the end of November 1954 when the season ended, isn't that correct?

A. That is correct.

Q. And you have testified that you indicated to the employees at that time that even though you knew that they had been employed over 30 days they would not have to sign up at that time, but could wait until the following spring and, if they came back to work at that time, then they would be expected to sign up?

A. To consider that they had already put in their 30 days in line with the contract. They were in position, as I explained, of those people where

(Testimony of Robert P. Crimmins.)

the money would not have come out until [332] the pay period between the 1st and 15th anyway, of December.

Q. You told this to some employees in November of 1954, is that correct? A. Correct.

Q. Did you tell that to Spangle?

A. I did.

Q. Thomas? A. I did.

Q. To Hatfield?

A. I am sure I did. However, that is one of the contentions there, as you know. I was told by Mr. Schneider that Hatfield denied it. It was many months after this had taken place.

Mr. Scolnik: I move to strike the last portion of the answer.

Trial Examiner: Motion denied. Go ahead.

Q. (By Mr. Scolnik): What is your recollection? A. Just what I was telling you.

Q. You are positive in your own mind that you did tell Hatfield?

A. Yes, that I talked to him. However, I would like to have this in the record, Mr. Hearing Officer: In my statement to the Field Examiner I told him that I would not swear to it in a notarized statement because I see hundreds of faces during the course of a year. I do know that I talked to three men up there that day, and I was sure I had talked to Hatfield. [333]

Q. You told the Field Examiner that you would not swear in an affidavit that you had talked to Hatfield at that time, is that right?

(Testimony of Robert P. Crimmins.)

A. That is correct.

Q. Well, are you willing to swear under oath now on the witness stand that you talked to Hatfield at that time?

A. I have already said it was my impression that I had talked to Hatfield at that time. I talked to three people. They were the only three names I had on the list.

Q. You are certain that you talked to Thomas and Spangle?

A. Right. They were sitting right around the campfire drinking coffee and eating sandwiches and I contacted both of them together.

Q. Isn't it a fact that as of May 4, 1955, or May 5, 1955, that Spangle, Thomas and Hatfield were all in substantially the same position? By that I mean they had all been hired about the same time in the fall of 1954, they had all worked or been employed for over 30 days by the time of the seasonal layoff at the end of November, 1954, and as of May 4 or 5, 1955, they had all been employed by the company substantially the same amount of time?

A. What date was that last date?

Q. May 4 or 5.

A. They were called back to work on March 16. That is my recollection, and were continually employed from then on up [334] to and through that period.

Q. So they were all in substantially the same position with respect to their employment record and their status in the union as of May 4 or 5?

(Testimony of Robert P. Crimmins.)

A. Correct.

Q. And Thomas and Spangle signed up on May 5? A. Correct.

Trial Examiner: Is that right?

The Witness: That is right, they did.

Q. (By Mr. Seolnik): But Hatfield didn't sign up on May 5, and you requested his discharge the very next day? A. That is correct.

Q. Would you care to explain why, under all of those circumstances, you took precipitous action with respect to Hatfield?

A. We have a union shop clause in our contract. All three of those people were in exactly the same position. None of them had ever signed up. They all knew very definitely that they were required to sign up. We had notices posted that they were required to sign up. The two men, Walter Spangle and Paul Thomas, signed up when they were asked. The other man didn't. As far as I am concerned his reaction to Mr. Dickey was a direct refusal and an excuse to get rid of Mr. Dickey, no other, because he had never signed a card and had never made an attempt to sign a card. [335]

* * * * *

Q. (By Trial Examiner): Am I right that you had a conversation with Dickey in the afternoon, or early evening of May 11th of this year?

A. That is correct.

Q. That conversation took place prior to the meeting?

A. Yes. I always contact Mr. Dickey. In fact,

(Testimony of Robert P. Crimmins.)

I usually talk to all of the boys through dinner. I eat up there.

Q. Did Mr. Dickey tell you at any time before the meeting on May 11th that Hatfield wanted to sign up with the union? A. No, he did not.

Q. Did he make that statement at all at the meeting that was held that evening? [338]

A. I just can't recall whether he did or not, Mr. Hearing Officer. However, he was conducting the meeting during the entire proceedings and, as chairman, he makes very few statements.

Q. Were the members advised at that time that Hatfield was attempting to sign up in the union?

A. Not to my knowledge. I hadn't been advised at that time that he was attempting to sign up in the union. The only thing I had had on it was that Mr. Hansen told me he thought he would have him in the union in a few days.

Q. Did you tell that to anybody?

A. Yes, I did. I made a full report of the entire situation.

Q. At the meeting?

A. At the meeting, as a Business Agent's Report.

Q. What did you tell the members about Hatfield attempting to sign up?

A. I didn't tell them anything about him attempting to sign up.

May I tell this in my own words?

Q. Go ahead.

A. First, I made a full report on the break that

(Testimony of Robert P. Crimmins.)

was given these people the previous fall. I gave a full report on the fact that Spangle and Thomas had signed up, that the other man hadn't. I also made a full report on my conversation with Mr. Hansen, and that he had told me he would have him in the union— [339] without going into the conversation here because you already have it in the record—and I explained the whole situation to the membership, told them what procedure I had taken in requesting the man's discharge.

When the complete story was told, and I don't know who, but someone on the floor of the crew meeting made a motion to support the action taken by the Business Agent.

Q. Did anybody at this meeting make any statements regarding, or say anything regarding the Hatfield derogatory remarks about the union?

A. Yes, there were a couple of remarks made there.

Q. What was said about that and by whom?

A. I don't remember it exactly. As I remember, there was one report definitely made by Ed Watkins. There were a couple of other people there, and I can't recall who they were, that said that he had strictly a non-union attitude, that he just didn't want to get into it unless he absolutely had to, and that he was going to get out of it if he could.

Q. What was the reaction of the members regarding that report?

A. They just went ahead with their motion that the Business Agent's action be supported.

(Testimony of Robert P. Crimmins.)

Q. Watkins, was he a job steward?

A. No. Watkins was just a member.

Q. And Watson is the fellow that was here?

A. The fellow that was here, yes.

Q. And testified before?

A. Yes. He was just a member. He practically always attended the meetings, when we had meetings in the woods.

Q. Did Spangle and Thomas attend that meeting? A. No.

Trial Examiner: Any other questions?

Redirect Examination

Q. (By Mr. Halpin): You have been asked several times about anti-union expressions attributed to Mr. Hatfield.

Trial Examiner: I used the word "derogatory," not "anti-union."

Q. (By Mr. Halpin): Well, derogatory expressions. Do you mean that you heard that Mr. Hatfield said something to the effect that he was opposed to the union, but would join, or did he say that he was just unwilling to join—which is it that you heard?

A. As far as hearing anybody say that he said he was unwilling to join, if forced, I didn't. They said that he was not going to join if he could possibly get out of it.

Q. That was the sort of remark that you heard attributed to Mr. Hatfield, general remark that you heard? A. Yes. [341]

* * * * *

(Testimony of Robert P. Crimmins.)

Q. (By Mr. Halpin): With respect to the application card which has been introduced in evidence and attributed to Mr. Hatfield, which is General Counsel's Exhibit No. 12 and which I now show you, can you tell us whether that card is filled out properly?

Trial Examiner: Show him the original.

Mr. Halpin: I don't have the original.

Mr. Scolnik: Here it is.

Mr. Halpin: I am now showing the witness the original card of which General Counsel's Exhibit No. 12 is a photostat.

A. In the first place, there is a deletion on the card and that is the local union number. It is not there.

Trial Examiner: Was this application refused because it wasn't filled out right?

The Witness: No. [342]

* * * * *

Recross Examination

Q. (By Mr. Scolnik): This statement that Watkins made—I will not repeat it—did he make that statement to you prior to his testimony here today, had you heard it before?

A. I heard it up there at that meeting.

Q. He made it at the May 12 meeting?

A. Right—not the May 12 meeting, but the May 11th meeting. He made it to me at other times that I have talked to him. I see those boys around the camp all the time. [343]

* * * * *

Mr. Scolnik: I don't have any witnesses. I have just two matters that I would like to put in at this time.

First, I will ask the Examiner to take official notice that Charles Hatfield filed a charge in Case 20-CA-1111, on June 14, 1955, against the Ralph L. Smith Lumber Company, alleging that he was discharged on or about May 17, 1955, in violation of Section 8(a) (1) and (3) of the Act.

I ask that the Examiner take official notice of that fact.

I have a copy of that charge in my possession if anybody wants to see it.

Trial Examiner: Go ahead.

Mr. Scolnik: Second, on the basis of an off-the-record discussion with counsel, I understand that he will join in the following stipulation: That on July 21, 1955, Mr. Frank Schuman, an attorney in Redding, mailed to the union his own check in the amount of \$30.50 covering \$20 initiation fee and \$3.50 dues for each of the months of April, May and June, 1955, in behalf of Charles Hatfield; that Mr. Schuman's letter and check were received by the union on July 22, 1955, and the letter and the check were forwarded by the union to Mr. Halpin on July 27, 1955, who returned the check to Mr. Schuman with [347] a letter which stated "Mr. Hatfield is at this time ineligible for membership in the union."

Will counsel so stipulate?

Mr. Halpin: I will stipulate to that, with the understanding that we are not stipulating that the

money was actually given to Mr. Shuman by Mr. Hatfield for this purpose, and that Mr. Shuman had authority to send his check.

Trial Examiner: Do you accept the amendment?

Was it tendered on behalf of Mr. Hatfield?

Mr. Halpin: Yes, the letter says it was, but we don't know that Mr. Hatfield authorized it.

Trial Examiner: You didn't refuse the money because you weren't sure Mr. Shuman had authority to tender it?

Mr. Halpin: In part, yes, we did.

Trial Examiner: Do you mean to say that you wouldn't take any money for somebody's dues because you didn't know the party who was tendering it?

Mr. Halpin: That isn't the point. We take the position that Mr. Hatfield never did at any time of his own free will offer to tender his own money, and I am going to make a motion in that connection in a little while.

Trial Examiner: What about this stipulation?

Mr. Scolnik: I think, perhaps, Mr. Halpin will accept this amendment to the stipulation, namely, that in his letter to Mr. Shuman returning the check, the entire letter states as [348] follows:—

Trial Examiner: Put the letter in evidence, please, and let us go ahead.

Mr. Scolnik: Mr. Examiner. it will only take a minute to read it. It will save the trouble of making copies and putting documents in.

The letter states as follows:

"Enclosed please find your check in the amount

of \$30.50. Local Union 13-433 IWA-CIO, takes the position that Mr. Hatfield is at this time ineligible for membership in the union.”

Do you so stipulate?

Mr. Halpin: I so stipulate.

Trial Examiner: Do you so stipulate?

Mr. Scolnik: I so stipulate.

Trial Examiner: Do you stipulate to the contents of Mr. Shuman's letter to the union?

Mr. Halpin: I will stipulate that the letter says what it says, but I am not going to stipulate as to the facts in the letter.

Trial Examiner: Of course not.

Mr. Scolnik: I will ask the reporter to mark for identification, as General Counsel's Exhibit No. 23, a copy of Mr. Shuman's letter, and I will offer it in evidence. [349]

(Thereupon the letter above referred to was marked General Counsel's Exhibit No. 23 for identification.)

Trial Examiner: Any objection?

Mr. Halpin: No objection to that.

Trial Examiner: There being no objection, the paper is received in evidence and I will ask the reporter to kindly mark it as General Counsel's Exhibit No. 23.

(The letter above referred to, heretofore marked General Counsel's Exhibit No. 23 for identification, was received in evidence. [350]

[See page 239.]

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 2

(For Identification)

WORKING AGREEMENT

Between

INTERNATIONAL WOODWORKERS
OF AMERICA

Local Union 13-433

and

RALPH L. SMITH LUMBER COMPANY
Anderson, California

* * * * *

Article II.

Union Membership

a. The National Labor Relations Board having certified that a majority of the employees have voted to authorize the Union to seek a clause requiring membership in the Union as a condition of employment, the following clause shall become a part of this agreement:

"Within 30 days from the effective date of this clause or within 30 days after employment, every employee represented by the Union, as a condition of employment, shall become and remain a member of the Union. This clause is subject to the terms and provisions of Section 8 of the Labor Management Relations Act, 1947."

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 4

[Letterhead of International Woodworkers of
America, Local 13-433, Anderson, California.]

Stamped: Received May 9, 1955.

May 6, 1955

Mr. A. B. Hood, General Manager
Ralph L. Smith Lumber Company
P. O. Box 697
Anderson, California

Dear Sir:

Under Article II, Section (a) "Union Membership" of the Working Agreement existing between the Ralph L. Smith Lumber Company and Local Union No. 13-433 I.W.A.-C.I.O., the Union is requesting the discharge of Charles Hatfield. Mr. Hatfield is employed in the Woods as a choker setter. He has had ample time to join the Union and the opportunity has been offered to him by both I and the Shop Stewards in the department.

Looking forward to your immediate cooperation in this matter, I remain

Very truly yours,

/s/ ROBERT P. CRIMMINS,

Robert P. Crimmins,

Business Agent, Local 13-433,
I.W.A.-C.I.O.

RPC:mt

GENERAL COUNSEL'S EXHIBIT No. 5

(Copy)

May 16, 1955

Mr. A. B. Hood, General Manager
Ralph L. Smith Lumber Company
P. O. Box 697
Anderson, California

Dear Sir:

Under the date of May 6, 1955, I wrote you concerning Charles Hatfield, an employee of the woods department. I am sure you will remember the Union requested the discharge of Mr. Hatfield in that letter. The specific request of the Union was not carried out by the logging Superintendent in this case.

On Saturday, May 14, 1955 I received a typewritten copy of a letter dated May 13, 1955, addressed to Mr. Walter O. Hansen, signed by Charles Hatfield. I have noted under enclosure that a copy was also sent to you, and I trust you have received it by now.

I wish to refer you to the contents of the letter signed by Mr. Hatfield and witnessed by James Gordon.

I don't believe it is necessary to point out to you that the procedure outlined in the letter is illegal, and cannot be accepted by the Union. I would also like to refer you to the ruling handed down by Judge Ross of Redding in the case of Coast Pacific

General Counsel's Exhibit No. 5—(Continued)
versus Lumber and Sawmill Workers of A. F. of L.

It is my belief, Mr. Hood, that you were not aware of the action being taken by the Logging Superintendent until you received a copy of the letter, and in my opinion I do not believe you would have sanctioned such action had you been informed of it.

The Union would like to request that you take proper action in this matter, and see that the Union's rights under Article II, Section (2) "Union Membership" of the Working Agreement are properly observed by the Company.

Thanking you for your cooperation in this controversy, I remain

Very truly yours,

Robert P. Crimmins,
Business Agent, Local 13-433,
I.W.A.-C.I.O.

RPC:mt

GENERAL COUNSEL'S EXHIBIT No. 6

(Copy)

RALPH L. SMITH LUMBER COMPANY

Manufacturers of Ponderosa Pine, Sugar Pine,
Incense Cedar, Douglas Fir and White Fir
General Office—Anderson, California

May 17, 1955

Mr. Robert P. Crimmins
Business Agent
Local 13-433 I.W.A.-C.I.O.
P. O. Box 923
Anderson, California

Dear Mr. Crimmins:

This will acknowledge receipt of your letter of May 6th, also your registered letter of May 16th, with reference to Charles Hatfield, an employee of the woods department.

Following the first letter, no immediate action was taken because so many times an employee will join the union according to the contract, following such action by the union.

You are aware that Mr. Hatfield signed an authorization for deduction of union initiation fee and union dues, this authorization being dated May 13, 1955. Your registered letter of May 16th was written by you with full knowledge of this authorization. We therefore conclude that it is not acceptable to the union, and accordingly Charles Hatfield was

General Counsel's Exhibit No. 6—(Continued)
discharged this noon, according to your requirements.

Yours very truly,

RALPH L. SMITH LUMBER
COMPANY,

By

A. B. Hood,
General Manager.

ABH:ES

GENERAL COUNSEL'S EXHIBIT No. 7

(Copy)

RALPH L. SMITH LUMBER COMPANY

Manufacturers of Ponderosa Pine, Sugar Pine,
Incense Cedar, Douglas Fir and White Fir

General Offices—Anderson, California

May 20, 1955

Mr. Robert P. Crimmins
Business Agent
Local 13-433 I.W.A.-C.I.O.
P. O. Box 923
Anderson, California

Dear Mr. Crimmins:

We are enclosing our check in the amount of
\$23.50 which represents union initiation fees of

General Counsel's Exhibit No. 7—(Continued)

\$20.00 and union dues of \$3.50 for Charles Hatfield. We have a signed authorization from Mr. Hatfield to make this deduction from his payroll check, and to pay the amounts deducted to the Union. In addition to the signed authorization, Mr. Hatfield called at the office on May 18th and specifically requested that we make the deductions authorized by him, and make payment to the Union.

Inasmuch as our contract provides that we will withhold dues and pay them to the Union, we are abiding by the contract by forwarding this payment to you.

As you know, Charles Hatfield was discharged by the Company on May 17, 1955 inasmuch as the union had requested his discharge under Article II, Section (a).

Yours very truly,

RALPH L. SMITH LUMBER
COMPANY,

By

R. W. Mason,
Secretary-Treasurer.

RWM:ES

Enclosure

GENERAL COUNSEL'S EXHIBIT No. 8

(Copy)

May 23, 1955

Mr. R. W. Mason, Secretary-Treasurer
Ralph L. Smith Lumber Company
P. O. Box 697
Anderson, California

Dear Sir:

Please find enclosed a check made out by you to C.I.O. Local 433, dated May 20, 1955.

In your letter you stated the amount \$23.50 was to cover initiation fee and dues for one Charles Hatfield.

Inasmuch as Mr. Hatfield is not a member of the Local, and is at this time not eligible; the Union is requesting that you make payment of this amount to Mr. Hatfield.

Very truly yours,

Robert P. Crimmins,
Business Agent, Local 13-433,
I.W.A.-C.I.O.

RPC:mt

Enc. Check

Letter mailed registered mail, return receipt. Return receipt card signed for as follows: R. W. Mason, by Rm. Erickson, 5/24/55.

GENERAL COUNSEL'S EXHIBIT No. 9

RALPH L. SMITH LUMBER COMPANY

General Sales Offices:
Anderson, California

Manufacturers of Ponderosa Pine, Sugar Pine,
Incense Cedar, Douglas Fir and White Fir

5-13-1955

Mr. A. B. Hood:

I have offered to join the union. As soon as the papers are offered to me to sign I will do so.

/s/ CHARLES HATFIELD.

I have rec'd Del. 5/13/55.

GENERAL COUNSEL'S EXHIBIT No. 10

(Copy)

13 May 1955

Ralph L. Smith Lumber Company
Woods Operation
Attention: Mr. Walter O. Hansen

Dear Sir:

Please find enclosed my authorization for the deduction of union dues and initiation fees which have been signed by me this date to be considered as nunc-pro-tunc to 1 November 1954.

You are authorized by me to make the deductions from my pay check in accordance with the enclosed union deduction slip.

General Counsel's Exhibit No. 10—(Continued)

Yours very truly,

Charles Hatfield.

Witnessed: James Gordon, Job Steward, International Woodworkers of America, C.I.O. Local Union 13-433.

Enclosure

cc/ Mr. Robert Crimmins, Mr. A. B. Hood.

GENERAL COUNSEL'S EXHIBIT No. 11

(This Copy to Employer)

Date 5/13/55

To Ralph L. Smith Lbr. Co.

I hereby authorize you to deduct from my wages and to pay to Local Union No. 13-433, International Woodworkers of America, the following:

Union initiation fees in the amount of \$20.00,

Union dues \$3.50 per mo.,

Union assessments in the amount and at the time stated in notice received by you from the Local Union.

/s/ CHARLES HATFIELD,
Signature of Employee.

Social Sec. No. 557-22-0008, 2122 Pine St., Redding, Calif.

Deducted May '55 payroll.—H. J.

GENERAL COUNSEL'S EXHIBIT No. 12

Application for Membership in

International Woodworkers of America

Affiliated with Congress of Industrial Organization
and Canadian Congress of Labour

Name: Charles Hatfield. Book No.....

Home Address: 2122 Pine St., Redding, Calif.

Date of Birth: Sept. 11, '20.

Employed at Ralph L. Smith Lbr. Co. S. S. No.
557-22-0008.

Starting Date: Oct. 17, 1954. Local No.

I hereby request and accept membership in the
International Woodworkers of America, and of my
own free will hereby authorize the I. W. of A. to
act for me as the collective bargaining agency in
all matters pertaining to rates of pay, wages, hours
of employment, or other conditions of employment.
It is further understood that upon acceptance of
my application by the local union, I shall then be-
come a member of the I. W. of A.

Have you ever been rejected or suspended from
any labor union?.....(Yes or No.)

If yes, state reasons and give details on back of
this card.

In case of misstatement of qualification for mem-
bership I agree to forfeit all rights, privileges and
moneys paid.

Applicant's Signature:

/s/ CHARLES HATFIELD.

Witness:

/s/ J. M. GORDON.

Date Initiated:

Date signed: 5-13-55.

GENERAL COUNSEL'S EXHIBIT No. 14

Date 5/5/1955

(This Copy to Employer)

To R. L. Smith Lbr. Co.

Name of Employer

I hereby authorize you to deduct from my wages and to pay to Local Union No. 13-433, International Woodworkers of America, the following:

Union initiation fees in the amount of \$20.00.

Union dues \$3.50 per month.

Union assessments in the amount and at the time stated in notices received by you from the Local Union.

PAUL E. THOMAS,

Signature of Employee.

Social Sec. No.

Address

Form 7 37844

GENERAL COUNSEL'S EXHIBIT No. 15

Date 5/5/1955

(This Copy to Employer)

To R. L. Smith

Name of Employer

I hereby authorize you to deduct from my wages and to pay to Local Union No. 13-433, International Woodworkers of America, the following:

Union initiation fees in the amount of \$20.00.

Union dues \$3.50 per month.

General Counsel's Exhibit No. 15—(Continued)

Union assessments in the amount and at the time stated in notices received by you from the Local Union.

WALTER D. SPANGLE,

Signature of Employee.

Social Sec. No. 546-40-4713, Millville, Calif.

Form 7 37844

Address

GENERAL COUNSEL'S EXHIBIT No. 21

International Woodworkers of America
Affiliated With The Congress of Industrial
Organizations and the Canadian Congress
of Labour

Constitution

Revised January, 1954

418 Governor Building

Portland 4, Oregon

* * * * *

Section 6: Any applicant who applies for membership in a Local Union and whose application is accepted shall be regarded as a member of that Local Union.

Section 7: No applicant, who has been accepted into the Union, shall be regarded as being a member with full rights and privileges until the full amount of the initiation fee has been paid to the Local Union where application for membership was accepted and the obligation administered.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 22

Constitution and By-Laws
International Woodworkers of America

Local Union 13-433

Anderson, California

* * * * *

Article 2

Section 1. Membership: To qualify for membership in this Union, candidates shall hold rights under the jurisdiction of this Union and shall become members by paying initiation fee and the current month's dues and dues for each month thereafter. No candidate can become a member without assuming the obligation of the International Woodworkers of America as administered by the local union.

Section. 2. Any candidate paying his or her initiation fee and failing to present himself or herself for initiation within one month shall forfeit the same to the Union, unless he or she can present a reasonable excuse. Any member becoming three (3) months in arrears for the nonpayment of dues or assessments shall be delinquent and shall forfeit voice and vote, unless officially exonerated, and may be suspended from membership. Any member becoming six (6) months in arrears for the non-payment of dues or assessments shall be suspended from membership.

* * * * *

GENERAL COUNSEL'S EXHIBIT No. 23

(Copy) July 21, 1955

Local Union 13-433, IWA-CIO

P. O. Box 923

Anderson, California

Re: Charles R. Hatfield

Gentlemen:

As you know, Mr. Charles R. Hatfield has been reinstated by the Ralph L. Smith Lumber Company as of July 14th, 1955.

Enclosed find my trust fund check in the sum of \$30.50; this sum represents \$20.00 initiation fee for joining the union and dues of \$3.50 per month for the months of April, May and June. It is understood that the succeeding months will be deducted from his pay in the usual manner by Ralph L. Smith Lumber Company and forwarded to you.

If there is any question concerning Mr. Charles R. Hatfield's application to join the union, this letter also constitutes such a request and application for joining same.

Very truly yours,

Frank W. Shuman.

FWS:vr

Enc.

cc: Ralph L. Smith Lumber Co.

National Labor Relations Board

Certificate

This is to certify that the attached proceedings before the National Labor Relations Board for the Twentieth Region in the matter of: International Woodworkers of America, CIO, Local Union 13-433 and Charles R. Hatfield, an Individual, Case No. 20-CB-408, Redding, California, September 28-30, 1955, were had as therein appears, and that this is the original transcript thereof for the files of the Board.

ACME REPORTING
COMPANY,
Official Reporters,

/s/ By C. W. JOHNSON,
Field Reporter.

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL
UNION No. 13-433, AFL-CIO, RESPONDENT**

**On Petition for Enforcement of an Order of the
National Labor Relations Board**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD**

JEROME D. FENTON,
General Counsel,

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FILED

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In the United States Court of Appeals
for the Ninth Circuit

No. 16089

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL
UNION No. 13-433, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD

This case is before the Court upon petition of the National Labor Relations Board, pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Secs. 151 *et seq.*)¹ for enforcement of the Board's order issued on February 20, 1957, against International Woodworkers of America, Local Union No. 13-433, AFL-CIO, herein called the Union. The Board's Decision and Or-

¹The pertinent provisions of the Act are set forth in Appendix B, pp. 24-25.

der are reported at 117 NLRB 405 (R. 12-35, 45-52); its Supplemental Decision (R. 52-56) at 119 NLRB No. 211. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred near Anderson California, where the Ralph L. Smith Lumber Company, the employer involved in this case, maintains a logging operation in the course of producing lumber for interstate commerce (R. 14; 7-8, 10).

STATEMENT OF THE CASE

I. THE BOARD'S FINDINGS OF FACT

Briefly stated, the Union, acting under a lawful agreement requiring union membership as a condition of employment, demanded the discharge of employee Charles Hatfield for his failure to pay an initiation fee and dues. Thereafter Hatfield tendered the initiation fee and dues, and James Gordon, a union shop steward, acting in his official capacity, accepted the tender. The Union repeated its discharge demand after the tender had been accepted, and the Company complied. The issue is whether the Board properly found that the acceptance of the tender by a union agent constituted a waiver by the Union of its right thereafter to demand Hatfield's discharge under its union-security agreement. The facts upon which the Board's findings rest may be summarized as follows:

A. The Union's first request for Hatfield's discharge

In October 1954, the Company hired Charles Hatfield, Paul Thomas, and Walter Spangle for its woods operation (R. 15; 154-155). Late in November of

that year, all three were informed by Robert Crimmins, respondent union's business agent, that they had been employed for 30 days or more and must therefore, in accordance with the union-shop contract then in effect between respondent and the Company, join the Union to retain their jobs. The three men pointed out that the Company was about to shut down its woods operation for the winter, and Crimmins agreed not to insist upon their joining the Union until their employment in the spring. (R. 15-16; 194, 204, 206).

The woods operation reopened about the middle of March 1955 (R. 16; 116). However, no further request to join the Union was made of Hatfield, Thomas or Spangle until May 5.² On that date, Ernest Dickey, vice president of the Union and its head steward in the woods, requested the three men to sign membership cards (R. 16; 157-158). Thomas and Spangle complied. Hatfield refused on the ground that he believed he had signed such a card the preceding fall (R. 16; 158, 207).

When Crimmins arrived at the camp later the same day, Dickey told him of his conversation with Hatfield (R. 16; 196). Crimmins searched the union records and found that, so far as he could ascertain, Hatfield had neither applied for membership

² James Gordon, shop steward in the section of the woods in which these three men were working, testified without contradiction that the question of union membership was raised by Spangle in a conversation with him on May 2, and that he planned to request all three men to sign application cards the following day but was injured and hospitalized before he could do so (R. 187).

nor paid the necessary dues and initiation fee (R. 16-17; 213-214).

On the following morning, Friday May 6, Crimmins again went to the woods and, without speaking to Hatfield, asked Herbert J. Johnston, the Company's timekeeper, payroll clerk, and storekeeper in the woods, how he could most expeditiously get a letter to Arthur B. Hood, the Company's General Manager, explaining that he intended to ask for Hatfield's discharge under the union-shop proviso of the collective bargaining agreement between the Company and the Union (R. 17; 75-76, 197).³ Later in the day Crimmins wrote Hood, requesting Hatfield's discharge for not having joined the Union (R. 17; 226, 195-196).

B. Hatfield's extensive efforts to join the Union

During the noon hour on Tuesday, May 10, Walter D. Hansen, the Company's Logging Superintendent in the woods, told Hatfield that he had heard a rumor that the Union intended to request Hatfield's discharge because he had not joined the organization. Hatfield immediately said that he was perfectly willing to join. Hansen then asked some of the employees within earshot of this conversation if some-

³ Johnston testified without contradiction that he protested the precipitousness of Crimmins' action, and suggested that he speak to Hatfield; that Crimmins replied that since he (Crimmins) was being called a "son-of-a-bitch" he might as well act like one; that Johnston then suggested that Crimmins "turn the other cheek" to Hatfield; and that Crimmins replied that he was "out of cheeks" so far as Hatfield was concerned (R. 76)

one could sign Hatfield up. They told Hansen that since Jim Gordon, the union job steward, was ill, Hatfield should go to the camp and see Ernest Dickey, the head woods steward. Hatfield replied that it was difficult for him to get to the camp, but that he would make every effort to do so. (R. 18n; 176-177.)

During the next three days, Hatfield made seven unsuccessful attempts to join the Union:

After quitting time on May 10 he went to the camp and tried unsuccessfully to find Dickey. When Dickey, who had gone fishing, returned to camp, he was told by Harvey Watson, the Union's recording secretary for the woods operation, that Hatfield had been looking for him in order "to sign a card to enter the union." (R. 18; 159.)

At about 6:30 a. m., on the following morning, May 11, Hatfield walked into the Company store and asked Johnston to sign him "into the union." Johnston explained that he did not have authority to do this and suggested that Hatfield see Dickey (R. 18-19; 79-80). After work Hatfield went to Dickey's house but Dickey was not home. Hatfield then went to the Company store and asked Charles Holbert, a landing or side rod foreman, to inform Dickey that Hatfield had been looking for Dickey and wished to join the Union (R. 19; 83).

During this period, Crimmins continued in his determination to have Hatfield discharged. During the morning of May 11, Logging Superintendent Hansen, who believed that Hatfield was sincere in his desire to join the Union, remarked to Crimmins that he

(Hansen) would shortly have Hatfield either join the Union or pay the required dues. Crimmins replied that he had not enlisted the Company's aid in obtaining Hatfield's union membership and that in his letter of May 6, he had asked for Hatfield's discharge (R. 19; 199). That evening, at the regular monthly union meeting of the woods crew, Crimmins informed the group that Hatfield had failed to join the Union, and requested ratification of his written demand to the Company for Hatfield's discharge. Neither Dickey, who presided at the meeting, nor Watson, told the group that Hatfield had expressed a desire to join the Union and had attempted to see Dickey for this purpose (R. 161-162, 218). There is no indication that the group was aware that Crimmins had not spoken to Hatfield. The group ratified Crimmins' discharge demand on the basis that Crimmins reported to them (R. 20 n.; 161-162, 200, 218-219).⁴

On the morning of May 12, just before the camp bus started for the woods, Hansen told Dickey that Hatfield was anxious to join the Union, and that he would like "to get the mess about [him] straightened out." Dickey told Hansen that the matter was out of his hands (R. 19; 178-179, 163-164). At about

⁴ According to the testimony of Dickey and Crimmins, the next night, May 12, the Union held its monthly meeting in Anderson. The minutes of the May 11 meeting of the woods crew, including the ratification of Crimmins' discharge request, were presented to the membership and adopted as read (R. 161, 170, 207, 338). There is no indication in the record that the group was informed of Hatfield's efforts to join the organization.

this time Hatfield saw Dickey sitting in the bus, hurried over to him, and asked him if he had any union cards which Hatfield could sign. The bus started before Dickey could reply (R. 19; 160). Hatfield thereupon returned to the Company store, borrowed pen and paper from Johnston, the company's time keeper and woods store keeper, and wrote and handed Johnston the following note (R. 20; 84-87, 233, 179-180):

I have offered to join the Union as soon as the papers are offered me to sign I will do so.

Johnston turned this note over to Logging Superintendent Hansen (R. 86). Later in the day, Hatfield approached Dickey in the woods and asked Dickey why he did not have the papers for Hatfield to sign. Dickey replied that the Union had had its crew meeting the preceding night, that everything was beyond his control at that time, and that he could not let Hatfield sign any cards (R. 20; 161).

C. Union Steward Gordon signs Hatfield into the Union

During the morning of May 13, James Gordon, the Shop Steward in the woods to whom Hatfield would normally have applied for union membership, but who had been hospitalized since May 2 (*supra*, n. 2), returned to camp and walked into the store. Johnston discussed Hatfield's problem with Gordon, saying that he felt that the situation had been mishandled. Gordon agreed with Johnston and said that under the circumstances he would be willing to sign Hatfield "into the Union" (R. 21; 88, 89).

After Gordon had left, Johnston prepared the following letter for Hatfield's signature, addressed to the Company for the attention of Hansen (R. 21, 233-234, 89-90):

Please find enclosed my authorization for the the deduction of Union dues and initiation fees which have been signed by me this date to be considered as nunc-pro-tunc to 1 November 1954.

You are authorized by me to make the deduction from my paycheck in accordance with the enclosed Union deduction slip.

When Gordon returned to the store a few hours later, Johnston showed him the letter, and they went to the woods to find Hatfield (R. 21; 90-91.) Before leaving for the woods, however, Gordon went to his house to obtain some union checkoff forms in order to "sign Hatfield into the union" (R. 21-22; 91). The two men found Hatfield in the woods, and presented him with the letter, together with a union application card and a checkoff slip. Hatfield signed the several documents, and Gordon signed the application as subscribing witness over his official designation as "Job Steward, International Wood Workers of America, Local 13-433" (R. 22; 90-93, 193, 233, 100, 235, 189-190).⁵

⁵ Notices posted by the Union expressly advised the employees that new applicants for membership should "contact the Union Shop Steward in their department, or the Business Agent of the Union, and be prepared to pay the Initiation Fee . . . and . . . a month's dues. A convenient Check-off Card is provided for both Initiation Fee and

Later that afternoon Hatfield told Gordon that he was sorry he had signed the checkoff slip authorizing the Company to deduct dues from November 1, 1954, because he had found that "the others were not paying back dues" (R. 22; 188).⁶ Gordon thereupon destroyed the checkoff slip and prepared another authorizing the checkoff of initiation fee and current dues (R. 22; 234, 98-99). Hatfield signed it and it was then handed to Johnston as was customary (R. 22-23, 26-28; 188-189, 97-98).⁷

On the following day, Saturday, May 14, Gordon told Crimmins that he had "signed up" Hatfield, and attempted to turn over Hatfield's membership application card and the carbon copy of his checkoff slip (R. 23; 189-191). Crimmins, without challenging Gordon's authority, replied that he "wished" that Gordon had not signed up Hatfield because he had asked for Hatfield's dismissal, and told Gordon to

monthly dues for your convenience" (R. 29; *infra*, p. 23). This notice, introduced in evidence as Respondent's Exhibit No. 8, was inadvertently omitted from the printed transcript of Record. It has been printed as an appendix to this brief, *infra*, p. 23.

⁶ No deduction for union dues was made for Spangle or Thomas from November 1954 through April 1955 (R. 27-28; 122, 138-141).

⁷ Some time between May 13 and May 15, Johnston noted on the checkoff slip and on the company records that Hatfield's dues were to be deducted beginning with the payroll period commencing May 15 (R. 23; 97). This procedure was in accordance with custom (R. 23; 108-110). The dues of employees signing checkoff slips between the 1st and 15th of the month were normally deducted from the second of the two monthly pay periods (R. 23; 102-103, 123-130).

keep the membership application card and the copy of the checkoff slip "for awhile" (*ibid.*).

D. The Union again demands Hatfield's discharge

On Monday, May 16, Crimmins wrote to the Company and, without mentioning either the union application card or the checkoff slip signed by Hatfield and retained by Gordon at Crimmins' request, stated that he had received a copy of Hatfield's so-called *nunc pro tunc* letter of May 13, that the procedure outlined therein was "illegal" and unacceptable to the Union, and that he again requested the Company to see that the Union's rights under the union-shop clause of the contract were properly observed by the Company (R. 23-24; 227).

The Company complied with the request and discharged Hatfield on May 17 (R. 24; 174-175, 229-230). On May 20, the Company, at Hatfield's request, sent the Union a check for \$23.50 to cover his initiation fees and dues for May (R. 24; 140-141, 150, 230-231). The check was returned by the Union with the information that Hatfield was not a member of the Union and was "not eligible" for membership (R. 24; 232, 222-224).

The Company reinstated Hatfield on July 14 (R. 24; 239). On July 21, Hatfield's attorney sent the Union a check for \$30.50 to cover Hatfield's initiation fees and dues for April, May, and June 1955, stating that future dues would be deducted by the Company in the usual manner (R. 24; 239). The check was returned by the Union's attorney with the information that Hatfield was not eligible for Union

membership (R. 25; 222-223). Subsequently the Company discharged Hatfield for cause (R. 24; 181).

II. THE BOARD'S CONCLUSIONS OF LAW

In its first decision on the merits of this case, the Board held, in accordance with its decision in *Technicolor Motion Picture Corp.*, 115 NLRB 1607, that the fact that Hatfield had tendered his initiation fee and dues to the shop steward prior to his discharge rendered his subsequent discharge for non-membership in the Union unlawful (R. 48-49). Thereafter this Court set aside the Board's order in the *Technicolor* case, 248 F. 2d 348, stating that the mere fact of belated tender would not automatically protect an employee from discharge under a union-security agreement, and that the Board's failure in that case to discuss alternative grounds (such as the Union's waiver of late tender) precluded the Court from sustaining the order on any such alternative basis (248 F. 2d at 355-356).

The Board thereupon, on its own motion, reexamined its decision in this case in the light of this Court's decision in *Technicolor*. Upon a reconsideration of the entire record, the Board reaffirmed its decision that the Union violated Section 8 (b) (2) and (1) (A) in causing Hatfield's discharge. In so holding the Board announced that, with all respect to this Court, the Board was adhering to the views it had expressed in the *Technicolor* case. In addition, however, the Board expressly stated that as an independent ground for its result it found that the Union

“accepted Hatfield’s tender and thereby waived his asserted delinquency as a ground for discharge” (R. 54-56).

III. THE BOARD’S ORDER

The Board’s order (R. 50-51) requires respondent to cease and desist from violating Sections 8 (b) (1) (A) and (2), to make Hatfield whole for any loss of wages he may have sustained as a result of the unfair labor practices, and to post appropriate notices.

ARGUMENT

THE BOARD PROPERLY FOUND THAT THE UNION, ACTING THROUGH ITS SHOP STEWARD GORDON, ACCEPTED HATFIELD’S TENDER OF DUES AND INITIATION FEES ON MAY 13, AND THEREAFTER VIOLATED SECTION 8 (b) (2) AND (1) (A) BY DEMANDING HIS DISCHARGE FOR NON-PAYMENT OF DUES AND FEES

A. Introduction—the issue defined

Although the general scheme of the statute makes it an unfair labor practice to discharge an employee for nonmembership in a union, Congress in the original Wagner Act created an exception to this general rule by permitting an employer and the labor organization representing his employees to enter into an agreement making union membership a condition of employment. 49 Stat. 449, Sec. 8 (3). This exception, which the courts held was to be narrowly construed,⁸ was further limited by Congress in Section

⁸ *N.L.R.B. v. Electric Vacuum Cleaner Co.*, 315 U.S. 685, 694-695; *N.L.R.B. v. Don Juan, Inc.*, 178 F. 2d 625, 627 (C.A. 2).

8 (a) (3) and 8 (b) (2) of the Taft-Hartley Act. Congress provided in Section 8 (b) (2) that, even where such an agreement existed, a union could not lawfully cause or attempt to cause the discharge of an employee whose union membership was "denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required" of members. And Congress provided in Section 8 (a) (3) that even under a union security agreement—

* * * no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *.

In construing these provisions the Supreme Court stated in *Radio Officers' Union v. N.L.R.B.*, 347 U.S. 17, 41, that

Congress intended to prevent utilization of union security agreements for any purpose other than to compel payments of union dues and fees. Thus Congress recognized the validity of union's concern about "free riders," i. e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union, and gave unions the power to contract to meet that problem while withholding from unions the power to cause the discharge of employees for any other reason.

Congress, in short, has limited the lawful discharge of employees under the terms of a union security agreement to "free-riders" unwilling to contribute their fair share to the union's support by paying the regularly required dues and fees. This one exception to an otherwise total prohibition against discharge based on nonunion activities rests solely on a recognition by Congress that a union operating under a union security agreement is entitled to financial support by all who enjoy the benefits of the contract, and is permitted only in order that a union operating under such a contract may effectively insist upon such support.

This Court in *N.L.R.B. v. Technicolor Motion Picture Corp.*, 248 F. 2d 348, dealt with an aspect of this problem closely related to that presented in the instant case. In *Technicolor* the employee had failed for several months to pay his initiation fee, and the union demanded his discharge. Thereafter the employee paid the fee, but the union continued to demand his discharge, and the employer eventually discharged him. In that case the Board relied *exclusively* upon its theory that tender of dues at any time prior to discharge protects the employee. On review in this Court it was argued in behalf of the Board that "an alternative ground exists for granting enforcement to the Board's order," namely, that the discharge was not effected until after the required tender had been made (248 F. 2d at 355). This Court, rejecting the Board's main theory, characterized the alternative contention as "not without appeal or merit" (*ibid.*), but held that that issue was

not ripe for review as the Board had not itself passed upon it. Accordingly, the Court remanded that case to the Board.

In the instant case, the Board with all respect adhered to the proposition which this Court rejected in *Technicolor*.⁹ In addition, however, the Board expressly advanced an alternative ground for its holding, namely, "that the [Union] accepted Hatfield's tender and thereby waived his asserted delinquency as a ground for discharge" (R. 54). We devote the remainder of this brief to a consideration of the facts which support this finding.

B. The Board properly found that the Union accepted Hatfield's tender, and thereby waived his delinquency as a ground for discharge

In the *Technicolor* case, this Court observed that "an employee must not remain perpetually vulnerable to discharge because of tardiness in submitting initiation fees, irrespective of the conduct engaged in by the union or the employer. Either the employer or the union may be estopped from asserting its particular rights under the collective bargaining agreement." 248 F. 2d at 356. We submit that on this record the Board properly found such an estoppel or waiver.

We start, of course, with the fact that Hatfield had been "delinquent" in the sense that under the contract between the Company and the Union he was

⁹ In deference to this Court's ruling in that case we shall not reargue the point here, although we have duly preserved it (R. 63) in the event of further review.

vulnerable to discharge for failing to join the Union within 30 days of being employed. The Union, however, had not pressed for strict observance of the 30-day requirement, for it had not only expressly condoned the failure of Hatfield, Spangle, and Thomas to join the preceding fall, but it had waited for nearly two months after the opening of the spring season before requesting the three men to sign membership cards (*supra*, p. 3). On Thursday, May 5, 1955, Spangle and Thomas effected their acquisition of union membership in the customary and accepted way by signing the cards proffered them by the head steward, Dickey. Hatfield, acting so far as the record shows in the utmost good faith, declined to sign the card because he believed, albeit mistakenly, that he had signed such a card the preceding fall.

At this point, the Union had manifestly "waived" the delinquency of Thomas and Spangle, but of course Hatfield's mistake did not bind the Union and, as of this date (May 5), he was still delinquent and the delinquency had not been waived. Business Agent Crimmins was therefore acting within the scope of his authority when, on the very next day and without even attempting to see Hatfield and point out the latter's mistake, he wrote the Company demanding Hatfield's discharge.

To concede, as we do, that Crimmins was technically warranted in calling for Hatfield's discharge is not to suggest that Crimmins acted reasonably or in good faith under the circumstances. Hatfield, after all, had not expressed unwillingness to meet

his obligation to the Union, but simply had expressed a mistaken belief that he had previously signed an application card. A company official had suggested to Crimmins that his action was unduly precipitous, and Crimmins' reply, quoted *supra*, p. 4, n. 3, as well as his subsequent actions establish that he was concerned with firing Hatfield, rather than with getting him into the Union even one day after Thomas and Spangle were accepted. Indeed, Crimmins said as much to Logging Superintendent Hansen (*supra*, p. 6) and to Union Steward Gordon (*supra*, p. 9).

Had the Company discharged Hatfield when it received Crimmins' letter of May 6, we could not contend that the Union had waived its right in his case as it had in the cases of Spangle and Thomas. But the Company did not fire Hatfield in response to the May 6 demand. Meanwhile, beginning May 10, Hatfield engaged in repeated and strenuous efforts to join the Union,¹⁰ but he was at first unable to locate the proper union official. Eventually, however, on May 13, Shop Steward Gordon signed Hatfield into the Union. At this time Hatfield was still in the Company's employ, and not until after receiving Crimmins' second letter demanding Hatfield's dis-

¹⁰ See *N.L.R.B. v. Aluminum Workers*, 230 F.2d 515, 520 (C.A. 7): "Against this background of [the dischargee's] attempt to pay her way, respondent's action in demanding her discharge becomes the more suspect, and it would appear that 'nonpayment of dues' was asserted as a lily-white front to cloak a demand for her discharge based on some other reason best known to respondent's officials."

charge, written several days after Gordon signed Hatfield into the Union, did the Company discharge Hatfield. It is our position that by the time of Crimmins' second letter to the Company—i. e., by the time of the "operative demand" for Hatfield's discharge¹¹—he had been accepted into the Union precisely as had Thomas and Spangle, and the Union had therefore waived its right to demand his discharge.

Hatfield was accepted into the Union, as were Spangle and Thomas, by signing the authorization card which Union Steward Gordon handed him and which Gordon thereupon endorsed in his official capacity. Hatfield's checkoff authorization was then turned over to the Company in the customary way (*supra*, p. 9). This was the method of joining the Union expressly provided for in notices posted by the Union and in its agreement with the Company (R. 55-56; *infra*, p. 23).

Gordon's status as a union agent with authority to "sign up" new employees is fully established by the record. Gordon's task as job steward was to sign up new employees and collect union dues (R. 191-192, 202-203). The testimony of Dickey, the Union's vice president, to the effect that he "took it upon himself" to request Thomas, Spangle, and Hatfield to sign union application cards on May 5, because the stewards were ill and because he happened to find himself working next to the three men on detail that day (R. 157-158), indicates that the Union looked

¹¹ *N.L.R.B. v. Aluminum Workers*, 230 F. 2d 515, 520 (C.A. 7).

primarily to the stewards rather than to any other union officers to perform this duty.

The Union has not contended, nor can it successfully contend, that the ratification of Crimmins' discharge demand, voted by the woods crew on May 11 and by the union membership in Anderson on May 12, either curtailed or modified the authority of Gordon in his capacity of shop steward to accept Hatfield's membership application and checkoff slip on May 13. Gordon had been in the hospital when the ratification had been voted and was unaware of it on May 13. The Union had failed either to inform him of this action or to modify his authority to sign Hatfield into the organization (R. 55-56; 170). Absent such information or modification of authority, that authority, and the power to bind the Union by its exercise, continued under well established principles of agency. *Hall v. Union Indemnity Co.*, 61 F. 2d 85, 91 (C.A. 8), certiorari denied, 287 U.S. 663, and cases cited; 2 Am. Jur., Agency, Sec. 41-42, 44; 2 C.J.S., Agency, Sec. 77b. See also, this Court's decision in *N.L.R.B. v. Cement Masons Local No. 555*, 225 F. 2d 168, 174, holding the union liable for a foreman's action which was within his authority under the union's working rules, although the authority had been revoked, unbeknownst to him, in this particular instance (225 F. 2d at 171, n. 3).

That Gordon had continuing authority on behalf of the Union to deal with Hatfield appears not only from general principles of agency but from testimony in this record. When Gordon attempted to hand Crimmins Hatfield's membership application and

checkoff slip, Crimmins said that he "wished" Gordon had not signed up Hatfield and told Gordon to keep the documents "for a while" (*supra*, pp. 9-10). Dickey, the head steward, told Gordon after the signing of Hatfield that he (Dickey) should have informed Gordon of the Union's ratification of Crimmins's demand for Hatfield's discharge (R. 170). Thus it is clear that Dickey and Crimmins regretted, but did not question, Gordon's authority with respect to Hatfield even after the Union's ratification of the discharge demand.¹²

In his discharge demand of May 16, Crimmins stated that the procedure outlined for the tender of Hatfield's initiation fee and dues in Hatfield's so-called *nunc pro tunc* letter of May 13 (*supra*, p. 10) was "illegal and cannot be accepted by the union," and by implication based his discharge demand on the ground that no valid tender had been made. This ground was without substance. Crimmins was fully aware at that time that Hatfield's tender of initiation fee and dues had also been made and accepted by Gordon in accordance with approved union procedure on forms provided by the Union for that purpose. Crimmins' failure to mention this valid tender coupled with the fact that he mentioned only the allegedly "illegal" tender outlined in the

¹² When Gordon was asked at the hearing whether he would have accepted Hatfield's application and checkoff slip if he had known of the Union's ratification of the discharge demand, he said "I probably wouldn't have" (R. 56; 194). The question of what Gordon might have done if circumstances had been different is not, however, an issue in the case.

nunc pro tunc letter constituted a misrepresentation of the facts.¹³

To recapitulate, the Union had accepted Hatfield into membership in the customary fashion before Crimmins wrote his letter of May 16 demanding Hatfield's discharge for non-membership. It was the

¹³ The true motive behind Crimmins' demands for Hatfield's discharge is not clearly revealed by the record. Since Hatfield, Thomas, and Spangle were all specifically permitted by Crimmins to defer union initiation and the payment of dues from December 1954 until the commencement of the woods operation in March 1955 and since the Union then made no move to sign them up until May, after Spangle had brought the matter to Gordon's attention (*supra*, p. 3), it seems unreasonable to suppose that compliance with the 30-day clause of the contract was of pressing importance to the Union. Crimmins' haste in demanding Hatfield's discharge without notifying Hatfield, although he knew that Hatfield had expressed a belief that he had already signed a union application card, together with the explanation of this haste, given the disapproving Johnston, that since Crimmins was "supposed to be a son of a bitch," he would "act like one," and that he was "out of cheeks to turn" to Hatfield (*supra*, p. 4), may well indicate that he was motivated by a particular animosity toward Hatfield. Such a supposition is strengthened by Crimmins' continued adamant insistence upon Hatfield's discharge, as late as May 16 on the alleged ground that Hatfield's *nunc pro tunc* letter was "illegal" although Crimmins was aware at that time that Hatfield had been "signed up" by a qualified union steward, and that a tender of initiation fee and dues had also been made by the procedure approved by the Union, and had been accepted by the steward and transmitted to the Company. It may be noted that Hatfield was openly hostile to the Union (R. 208-209), but his right to oppose the Union was protected by Section 7, and could not be the basis of lawful discrimination against him. Cf. *Aluminum Workers*, quoted *supra*, p. 17 n. 10.

May 16 letter, and not the earlier letter, which caused the discharge. Hatfield's union status at the time of the May 16 letter was precisely the same as the status of Thomas and Spangle, whose discharge was never requested in either letter. It follows, as the Board found, that the Union had waived Hatfield's earlier delinquency, and could not rely on his nonmembership in seeking his discharge. As the Union's discharge demand was not protected by the proviso to Section 8 (a) (3), the Union violated Section 8 (b) (1) (A) and (2) of the Act. *Communication Workers of America v. N.L.R.B.*, 215 F. 2d 835, 839 (C.A. 2); *N.L.R.B. v. Pape Broadcasting Co.*, 217 F. 2d 197, 199 (C.A. 5).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the Board's petition for the enforcement of its order should be granted in full.

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OCTOBER 1958.

APPENDIX A

Respondent's Exhibit No. 8

W A R N I N G

New Employees

The Union Shop Clause in the Contract between the Ralph L. Smith Lumber Company and Local Union No. 13-433, IWA-CIO, states:

"Within 30 days from the effective date of this clause or within 30 days after employment, every employee represented by the Union as a condition of employment shall become and remain a member of the Union."

It is essential that new applicants for membership contact the Union Shop Steward in their department, or the Business Agent of the Union, and be prepared to pay the Initiation Fee, which is \$20.00, and \$3.50 for a month's dues. A convenient Check-Off Card is provided for both Initiation Fee and monthly dues for your convenience.

The Business Agent is charged with the responsibility of enforcing the Union Shop clause, and any employee going over his or her 30-day period, and not having joined the Union, his or her discharge from employment will be IMMEDIATELY demanded.

BUSINESS AGENT

LOCAL 13-433, IWA-CIO

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

Sec. 8.(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a

condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; * * * *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership; * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * *

No. 16,089

United States Court of Appeals
For the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

INTERNATIONAL WOODWORKERS OF
AMERICA, AFL-CIO, LOCAL UNION
No. 13-433,
Respondent.

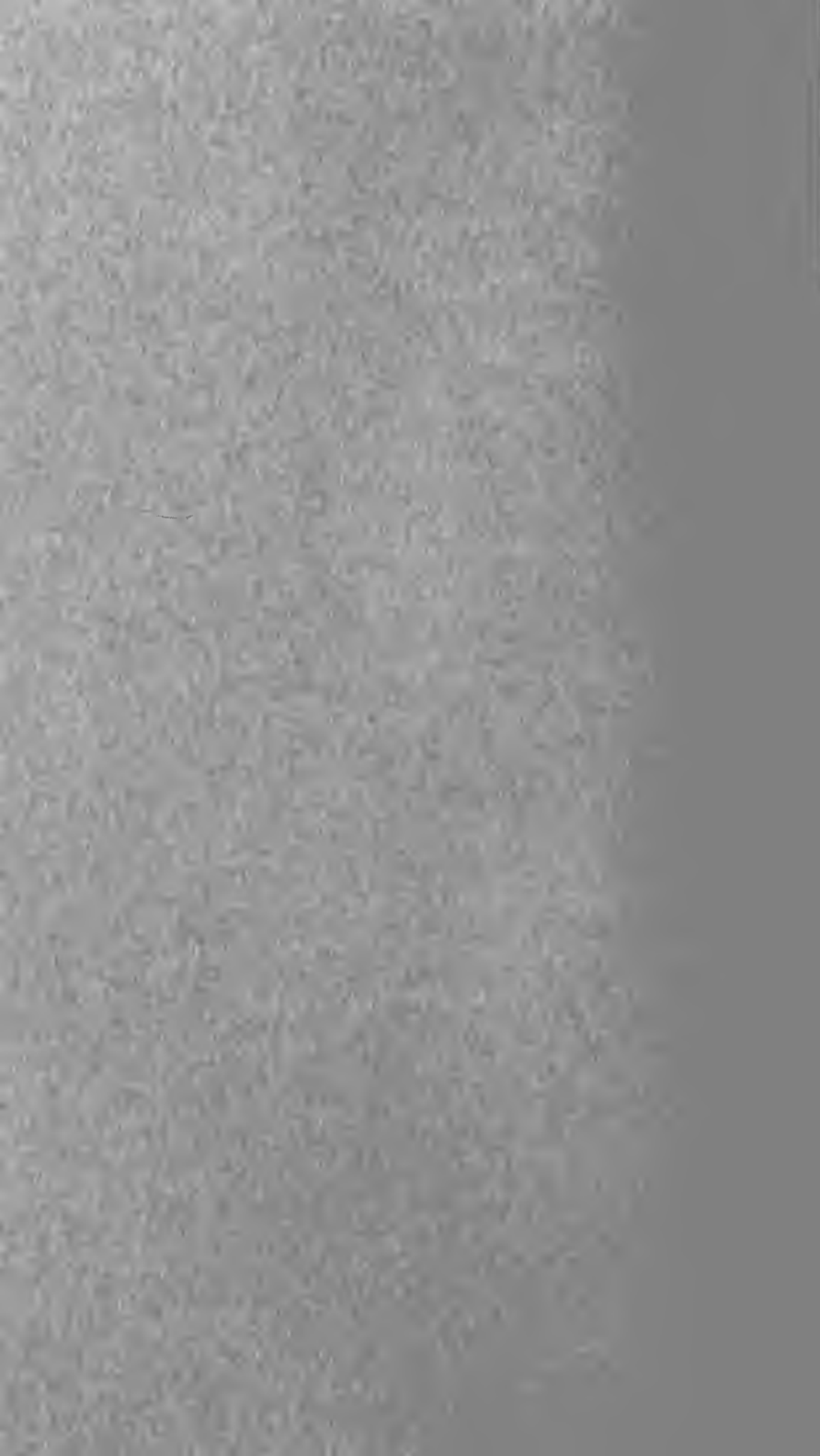
BRIEF FOR THE RESPONDENT
INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, LOCAL UNION NO. 13-433.

HALPIN, HALPIN & LEEP,
1428 West Street, Redding, California,
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FILE

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PAUL P. O'BRIEN



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**BRIEF FOR THE RESPONDENT
INTERNATIONAL WOODWORKERS OF AMERICA,
AFL-CIO, LOCAL UNION NO. 13-433.**

THE RECORD.

This case is before this Court for the second time. On the first occasion the Board was directed to make a determination of the matter on its merits, a determination it had at that time declined to make. (*NLRB v. IWA, Local 13-433*, 238 F.2d 378.) The Board took the opportunity upon remand to not only make a determination on the merits, but to make new findings specifically designed to avoid the ruling of this Court in *N.L.R.B. v. Technicolor Motion Picture Corp.*, 248 F.2d 348. (R. 52-56.) These new findings were made

without giving Respondent an opportunity to be heard and to present evidence on what was admittedly a new theory of the case. Respondent made a motion to reopen the proceeding to present further evidence on the question of estoppel and waiver; the new theory on which the Board relied. This motion was denied. Petitioner's motion and the denial of the motion are not part of the printed record because these two documents were not certified by the Board as part of the record before this Court. (R. 57-59.) Respondent understands that the motion and the denial of the motion were filed with this Court on August 7, 1958. Respondent respectfully requests that this Court take notice of these documents either in their present form or that they be printed as supplements to the present printed record. Respondent has been unable to order the documents printed as the Board has not certified the documents as part of its record. It is noted that the "Certificate of the National Labor Relations Board" dated July 11, 1958 states, "The documents annexed hereto constitute a *full and accurate transcript of the entire record* of a proceeding had before said Board, known as Case No. 20-CB-408". (Emphasis added.) (R. 57.) The statement quoted is not accurate. This Respondent will treat the documents as part of the record on the assumption that the Board by filing the documents after its certificate of service acknowledges their place in the record. As will be apparent later in this brief the documents are of importance.

FACTS.

Most of the facts are undisputed. Respondent has read the Board's statement of facts contained in its brief. There is no serious disagreement with this statement but the arrangement and emphasis seem argumentative rather than informative. For this reason, Respondent sets forth here, in chronological order, the facts as established by the record.

1. October 4, 1950—The union and Ralph L. Smith Lumber Company (hereinafter referred to as the company) entered into a collective bargaining contract which was in effect at all times relevant to the above entitled case. The contract contains the following provisions:

“Article II. Within 30 days from the effective date of this clause or within 30 days after employment, every employee represented by the union, as a condition of employment, shall become and remain a member of the union. . . .” (R. 225.)

2. October 18, 1954—Charles R. Hatfield was employed by the company as a choker-setter. Hatfield in his capacity as a choker-setter was within the group of employees covered by the contract between the company and the union. (R. 15, 154-155, 225.)

3. November 15-30, 1954—Robert Crimmins, the business agent for the union, approached Hatfield and two other new employees and requested that these employees join the union. The three employees asked if they might wait until the spring of 1955 to join the union as they expected to be out of work during the winter. Crimmins consented to the proposal of the

three men *provided they joined the union immediately upon returning to work in the spring.* (R. 205.)

4. November, 1954—The company's woods operation shut down for the winter. All three men were out of work. (R. 116.)

5. March 15, 1955—The woods operation opened for the season and all three men returned to work. (R. 116.)

6. May 5, 1955—Ernest Dickey, the union's shop steward, asked all three men to join the union. Two of the three agreed to join and signed check-off slips providing for the withholding of initiation fees and one month's dues from the pay checks of these two men. The third man, Charles R. Hatfield, refused to sign the application card stating he had already applied for membership. (R. 157-159.)

7. May 6, 1955—Dickey reported the conduct of Hatfield to Crimmins. Crimmins informed Herbert Johnston, a confidential employee of the company, that the union would request the discharge of Hatfield. (R. 75-77.)

8. May 6, 1955—Crimmins wrote the company a letter requesting Hatfield's discharge. (R. 226.)

9. May 9, 1955—Crimmins' letter was received by the company. (R. 68.)

10. May 9 or 10, 1955—The contents of Crimmins' letter was communicated to Walter Hansen, the woods boss for the company. (R. 176.)

11. May 10, 1955—Hansen informed Hatfield he would have to join the union or be fired. (R. 176.)

12. May 5-10, 1955—Hatfield indicated he was not interested in joining the union. He expressed his feeling in strong language. (R. 184.)

13. May 11, 1955, morning—Johnston states Hatfield asked Johnston to sign him up in the union. Johnston referred Hatfield to Dickey, the job steward. (R. 79-80.)

14. May 11, 1955, morning—Crimmins told Hansen that he was not interested in Hatfield's joining the union and that he wanted Hatfield discharged. (R. 198-199.)

15. May 11, 1955, afternoon—Johnston states Hatfield repeated the request of the morning and was directed to Dickey. (R. 82.)

16. May 11, 1955, evening—The union members working in the woods voted to support Crimmins in the stand he was taking on Hatfield. (R. 200-201.)

17. May 12, 1955, morning—Hatfield signed a document stating his intention to join the union. This document was dated May 13, 1955. (R. 85-87.)

18. May 13, 1955—Johnston approached James Gordon, a shop steward who, up to then, knew nothing about the union's demands, and persuaded Gordon to allow Hatfield to sign a checkoff slip. Hatfield signed a checkoff for initiation fees and dues from November 1954. This slip was given to Johnston. (R. 89-98.)

19. May 13, 1955—Hatfield retracted his checkoff slip and signed a new slip allowing the checkoff of initiation fees and one month's dues. This amounted to \$23.50. (R. 96-97.)

20. May 13, 1955—Johnston, in his capacity as company bookkeeper, erased a debt of \$28.95 Hatfield owed the company. Johnston then debited Hatfield's account for \$23.50 representing union initiation fees and one month's dues. (R. 112-116.)

21. May 13, 1955—Crimmins wrote the company a second letter demanding that Hatfield be discharged. (R. 227-228.)

22. May 17, 1955—Hansen discharged Hatfield. Hansen loaned Hatfield \$100.00. None of this has been repaid. At the same time he made the loan, Hansen told Hatfield he should see an attorney. (R. 24, 180-183.)

23. June, 1955—Hatfield was rehired by the company. (R. 24, 239.)

24. July, 1955—Hatfield was fired by the company for not reporting to work as a result of being arrested for disturbing the peace. (R. 181.)

25. February 20, 1957—The Board in its original decision held that a late tender, if made before discharge, was valid. The Board relied on its own decision in *Technicolor Motion Picture Corporation*, 115 N.L.R.B. 1607. No mention was made of waiver or estoppel. (R. 45-52.)

26. February 24, 1958—After this Court issued its decision in *N.L.R.B. v. Technicolor Motion Picture Corp.*, 248 F.2d 348, the Board without notice issued a supplemental decision finding that Respondent waived its right to discharge Hatfield for failure to make a prompt tender of his fees and dues. (R. 52-56.)

27. June 24, 1958—Respondent made a motion to reopen the record before the Board for the purpose of offering testimony that Hatfield knew the union would not waive its rights to discharge prior to the time he signed his checkoff card. (This is one of the two documents not in the certified record but on file with this Court.)

28. July 18, 1958—The Board denied the Respondent's motion to reopen. (This is the other document not in the certified record but on file with this Court.)

ARGUMENT.

THE RESPONDENT HAS NOT BEEN GIVEN AN OPPORTUNITY TO BE HEARD ON THE THEORY OF THE CASE RELIED ON BY THE BOARD.

It is apparent from a cursory reading of the record and the brief filed by the Board that the original decision in this matter was formulated on the theory an unfair labor practice existed if Respondent refused to accept late tender.

In the *Technicolor* case, this Court specifically rejected the late tender argument. This Court did say, however,

“ an employee must not remain perpetually vulnerable to discharge because of tardiness in submitting initiation fees, irrespective of the conduct engaged in by the union or the employer.” 248 F.2d 348 at 356.

Acting obviously upon this Court's suggestion the Board in its supplemental decision found a waiver by Respondent of its right to insist on discharge.

Respondent contends it was prejudiced by the refusal of the Board to grant a hearing on the new theory. The *Technicolor* opinion itself suggests that a hearing would be necessary.

“Either the employer or the union may by its actions be estopped from asserting its particular rights under the collective bargaining agreement. But inherent in making such a determination is the balancing and accommodation of different interests and various factors based on policy considerations. The questions presented thereby are manifold. It would be necessary to ascertain what factors are relevant and the proportionate weight to be accorded each in the determination of whether a union is precluded to cause, or an employer to effect, the discharge of an employee based on failure to tender on time the uniformly required initiation fees under a valid union security agreement. *Moreover a conclusion predicated on equitable grounds denying Respondents the right to exercise their statute-approved contractual rights necessitates a complete and searching analysis of the particular factional situation.*” 248 F.2d 348 at 356. (Emphasis added.)

Keeping in mind the fact that all the testimony was taken under a different theory of the case it is difficult to see how the Board can maintain it had a sufficient record to make the determination required by this Court.

The unfairness to Respondent is even more apparent when the present method of decision making is matched against the Board's own rules. Rule 102.49

provides, in part, "The Board may at any time *upon reasonable notice* modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it." (Emphasis added.) No notice was given Respondent of the Board's intention to modify its original order dated February 20, 1957. The decision was made without taking further testimony. No opportunity to argue was given the Respondent. It appears from the uncertified papers on file with this Court that Respondent asked for a hearing upon receiving the supplemental decision of the Board. The request was denied.

It is difficult to see how a sound, equitable policy can be established by the Board in a proceeding which itself is inequitable. Even though further evidence was not permitted, Respondent should have at the very least been afforded a chance to argue the matter. As this Court suggested, the "questions presented thereby are manifold." (248 F.2d 348 at 356.) Respondent submits that the Board in making its supplemental decision without taking further evidence, without permitting Respondent to be heard and without giving Respondent notice, committed error.

Discussion concerning the theory of estoppel and waiver is contained in the closing portion of this brief. In connection with the failure of the Board to give Respondent notice of its modification of the original order it might be well to note certain items contained in the present record which have a bearing on the equitable factors of the case. These items might well be determinative upon further development of the

record. Respondent should have an opportunity to develop them.

1. Hatfield, the subject of the equitable right, was discharged by the company shortly after he was rehired upon the filing of the unfair labor practice in the present case. Wouldn't Hatfield's own attitude about his job be relevant when measuring equitable policy?

2. Hatfield lost only one month's pay as a result of the alleged wrongful discharge, was he made whole?

3. Hatfield acted in tendering his dues and initiation fee on the advice of the company's agents. Was Hatfield himself interested in his rights under the LMRA? These facts were not relevant at the original hearing on the Board's theory of the case. They seem to be relevant now.

THE QUESTION OF ESTOPPEL.

As indicated, the present record is inadequate because of the Board's refusal to allow further testimony after the original basis of its decision was rejected by this Court. Respondent will not comment on the *Technicolor* holding in view of the fact that the Board in its brief acknowledges it is bound by the decision. (Brief of the Board, 15.) It must be observed that the Board still insists as an alternate ground for its decision that any late tender is valid. This ground for the present decision is clearly erroneous and should be set aside. It is not clear from

the Board's decision whether it would have come to the same conclusion without a finding that late tender is valid. For purposes of argument, Respondent will assume that the Board would have arrived at the same result even though it did not persist in its view with regard to late tender.

The Board did not make a finding with respect to estoppel but in its brief it assumes waiver and estoppel to be the same. ("We submit that on this record the Board properly found such an estoppel or waiver." Brief of the Board, 15.) Respondent believes these two doctrines are distinct and will treat them separately. It might be helpful at the outset to quite precisely define the right which Respondent is supposed to be estopped from enforcing. This the Board has not done.

Absent estoppel Respondent had the right to have Hatfield discharged by the company on the 31st day after Hatfield was employed by the Company unless Hatfield had paid his initiation fee and one month's dues on or before the 30th day of his employment.

Estoppel is an equitable doctrine having slightly different elements in the various equitable jurisdictions. As this Court suggests, the doctrine requires analysis and precise balancing of various interests. This the Board has not done. In the absence of help from the Board and as a point of departure, Respondent will use the statement of the doctrine as contained in 18 *Cal. Jur.* 2d 406,

"four things are essential to the application of the doctrine. (1) The party to be estopped must

know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the true facts; and (4) he must rely on the former's conduct to his injury."

Applying these requirements to the instant case, we find that each requirement is totally missing from the facts. First, did the so-called estopping agent of Local 13-433 know the facts? Did Gordon, the shop steward and admittedly the agent of Local 13-433, upon whom the Board relies as creating estoppel, know the facts when he accepted the check-off slip? The Board's brief admits that Gordon did not know the facts. "Gordon had been in the hospital when the ratification (i.e. insistence on discharge) had been voted and was unaware of it on May 13. The Union had failed either to inform him of this action or to modify his authority to sign Hatfield into the organization." Brief of the Board, 19. Gordon not only did not know the facts, but it is clear from the evidence that he was selected by the company's confidential employee, Johnston, as the recipient of Hatfield's tender because he did not know the facts. (R. 89-98, 186-194.) The following question and answer to Mr. Gordon are significant on this point:

"Q. (Mr. Halpin). If you had known on May 13 that a discharge letter had been written on Hatfield, would you have signed him up?

Mr. Scolnik. I object to that.

Trial Examiner. Overruled.

A. I probably wouldn't have." (R. 194.)

Unless the person who is charged with having estopped the union from insisting on discharge knew the facts when he performed his alleged act of estoppel, the union cannot be estopped. The Board disregards the equitable nature of estoppel when it suggests the union had a duty to warn all of its agents not to take Hatfield's dues or face estoppel. The doctrine is quite the other way around. Unless the agent had actual knowledge, he cannot be estopped. In the instant case, we would have had the first element of estoppel only if either Crimmins or Dickey had taken Hatfield's check-off slip.

The second requirement of estoppel is also missing from the present record. There is no evidence that Gordon, by accepting the check-off slip intended Hatfield to act on his conduct. The most that can be said about Gordon's conduct is that it was non-committal. He obviously did not know what was going on and was not informed of the circumstances. (R. 186-194.)

The third requirement of estoppel is that Hatfield must have been ignorant of the true facts when he tendered his check-off slip. This requirement is not only missing from the evidence, but Hatfield's knowledge of the true facts is affirmatively and without contradiction proved. The true facts were that the union wanted Hatfield discharged and would not accept a late tender. The record shows the following:

“Testimony of Ernest Dickey. . . . Hatfield came up to where I was working and asked me why I didn't have cards for him to sign. I told him that everything was beyond my control at that time and I couldn't let him sign any cards.

We already had our crew meeting at the camp that night.

Trial Examiner. What night?

The Witness. On the night of the 11th. This was the morning of the 12th. I told him that we had our crew meeting the night before and they had concurred in the action the Business Agent had taken on this." (R. 160.)

Hatfield was not present at the hearing. It is apparent that Hatfield not only knew the union was insisting on his discharge, but that Gordon was selected as the recipient of the check-off slip because Hatfield knew that Gordon was unaware the union was insisting on Hatfield's discharge.

The fourth and last requirement of estoppel is equally conspicuous in the record by its absence. There is no evidence Hatfield relied on Gordon's conduct to his injury. In the first place, there is no evidence Hatfield was injured. It is true he was fired, but for a period of less than one month. He was then rehired and fired again for his own misconduct. (R. 24, 181, 234.) The record does not disclose a wage loss. Furthermore, a conscientious reading of the testimony indicates rather pointedly that Hatfield did not rely on Gordon's conduct. Hatfield knew he was going to be discharged and in a desperate attempt to avoid the inevitable consequences of his own conduct, he, with the assistance of the company's agent, Johnston, obtained a check-off slip from Gordon. (R. 88-97.) There is no evidence he relied on Gordon's conduct. He did not thereafter change his position. The situation might have been different if within the

thirty day period he had obtained a check-off slip from Gordon and Gordon had somehow failed to process the slip. There a plea of equitable estoppel would be compelling. Here the damage had been done through Hatfield's own carelessness and nothing Gordon did or did not do could possibly induce Hatfield to change his position for the worse.

In short, estoppel is not proved. What is more, the Board has totally failed to analyze the problem in line with this Court's suggestion in the *Technicolor* case. Respondent, because of this failure on the part of the Board, has resorted to an admittedly general description of estoppel without detailed reference to cases on the subject. The general description seems appropriate under the circumstances. Respondent regrets that the Board did not take the opportunity presented here to reopen the case, accept further evidence and hear argument on the rather complicated and important legal problem. Having failed to allow the matter to be adequately presented, Respondent believes the Board's decision should be reversed and the petition for enforcement denied.

THE QUESTION OF WAIVER.

As previously indicated, estoppel and waiver mean two different things. Respondent wishes to point out that in the *Technicolor* case this Court made no suggestion that waiver would be a further exception to the 30 day exception allowed by the Act. However, it has been said that a party can waive anything except perhaps his constitutional rights in a criminal

case. The Board in its brief is obviously relying on waiver rather than estoppel. What has been previously said concerning a lack of opportunity to argue and present further evidence is applicable to waiver as well as estoppel.

California Jurisprudence is of some help to us here as it was in considering estoppel. 25 *California Jurisprudence* 926 puts the problem as follows:

“... it is a general doctrine that to constitute a waiver there must be an existing right, benefit or advantage; a knowledge, actual or constructive, of its existence; and an actual intention to relinquish it or such conduct as warrants an inference of the relinquishment. It has been held that there must be a meeting of the minds and an intentional forbearance to enforce a right. Waiver is a voluntary act and implies an abandonment of a right which can be enforced, or of a privilege which can be exercised—an election to dispense with something of value or to forego some advantage which one might, at his option, have demanded or insisted upon.”

Waiver obviously is a legal, rather than an equitable doctrine. It is, in effect, a form of contract. The important distinction between estoppel and waiver is the requirement that to have a waiver one must have a meeting of the minds.

The Board has not defined waiver in either its decision or its brief. Not one single authority is cited on the subject. We have no idea what the Board means by waiver. No attempt is made to compare the evidence in this case with the accepted elements of

waiver. Because of this, Respondent will satisfy itself with a brief comparison of the evidence with the doctrine as generally defined by California Jurisprudence.

Three elements are required. One, existing right; two, a knowledge of the existence of the right; three, an actual or constructive intent to give up the right.

There can be no question that Respondent had the right to have Hatfield discharged and that Respondent knew it had this right. (Gordon, on the other hand, probably did not know about the right of discharge.) The first two elements of waiver are present here.

The third requirement is not present. The evidence discloses that the Respondent had no intention at any time of giving up its right to have Hatfield discharged. It is difficult to see how the Respondent's intention could be more plainly demonstrated than was demonstrated in this case. Two formal letters were sent to the company. Action was taken at two union meetings. The shop steward, Dickey, told Hatfield of the union's position and so did the business agent, Crimmins. The only evidence of intention to waive must come from Gordon. As previously indicated, Gordon testified he had no intention to waive the union's right. (R. 194.) What is more important, Gordon had no authority to waive the rights of the union. The Board in its brief approaches this question obliquely. It suggests Gordon had authority to sign Hatfield into the union. (Brief of Board, 19.) This is, of course, true. The Board, however, does not treat the real question. Did Gordon have author-

ity to waive the union's right to discharge Hatfield and did he intentionally waive the union's right in this case? Clearly Gordon did not intentionally waive the union's right because he did not know the union was standing on its right. One cannot intentionally give up a right one knows nothing about.

“The burden is upon the party claiming a waiver to prove it by such evidence as does not leave the matter doubtful or uncertain.” 25 *California Jurisprudence* 932.

There is nothing in the record to indicate that Gordon had the authority to waive the union's rights. The only evidence adduced indicates he did not have the right. (R. 202.) The vice of the Board's arbitrary and unnoticed change in theory is obvious when we consider this problem of waiver. The evidence is so skimpy on the subject that no intelligent evaluation of it may be made. However, the burden is on the party alleging the waiver to prove it. Here the burden was not met and the only evidence on the subject indicates the Respondent to be correct.

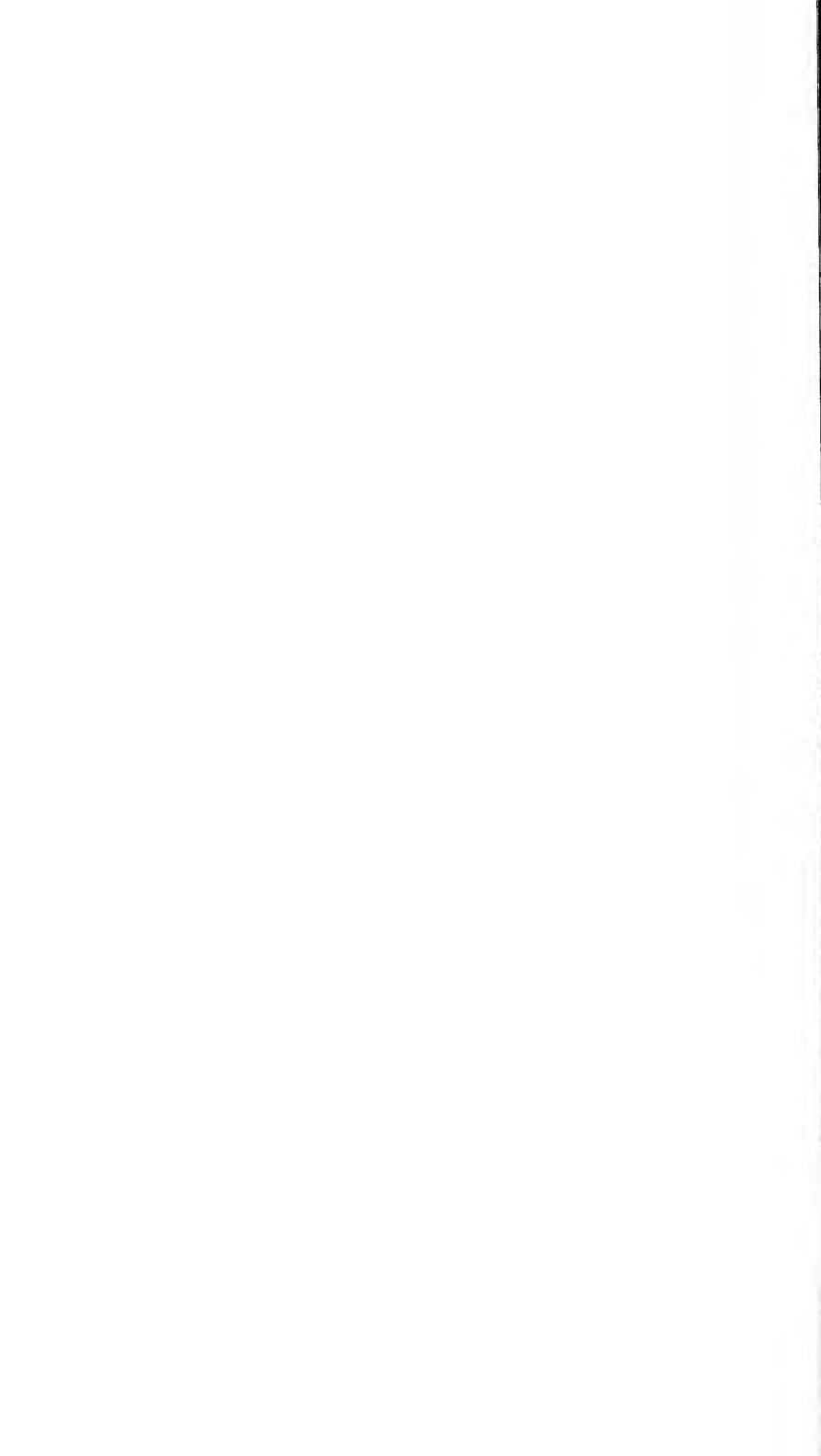
CONCLUSION.

Respondent contends the petition for enforcement of the Board's order should be denied. The Board has had ample opportunity to make its case. It has not done so. On the present record, Respondent is, at least, entitled to have the matter remanded for further proceedings. Respondent earnestly requests, however, that the petition be denied without further proceed-

ings. If the Board has evidence of waiver or estoppel it can start over again with a new complaint. Harassment of the Respondent will inevitably result if the Board is given a further opportunity to proceed on the present case.

Dated, Redding, California,
November 25, 1958.

Respectfully submitted,
HALPIN, HALPIN & LEEP,
Attorneys for Respondent.



No. 16089

**In the United States Court of Appeals
for the Ninth Circuit**

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

**INTERNATIONAL WOODWORKERS OF AMERICA, LOCAL
UNION No. 13-433, AFL-CIO, RESPONDENT**

**ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD**

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JEROME D. FENTON,

General Counsel,

THOMAS J. McDERMOTT,

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MARCEL MALLET-PREVOST,

Assistant General Counsel,

FREDERICK U. REEL,

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National Labor Relations Board.

FILED

DEC 27 1958

PAUL P. O'BRIEN, CLERK

**In the United States Court of Appeals
for the Ninth Circuit**

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

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INTERNATIONAL WOODWORKERS OF AMERICA, AFL-CIO,
LOCAL UNION NO. 13-433, RESPONDENT

*ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD*

REPLY BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

1. Respondent complains that it had no opportunity to be heard by the Board on the critical issues in the case, and that the case should be remanded to permit respondent to develop "certain items in the record" which "might well be determinative" (Br. 9-10). We submit that examination of the issues respondent seeks to inject serves only to underscore the validity of the Board's determination (of which respondent complains) not to reopen the case for further evidence (Br. 9).

By respondent's own admission "Most of the facts are undisputed" and respondent has "no serious disagreement" with the facts as stated in our opening brief (Br. 3). The facts which respondent seeks to

adduce would be completely irrelevant to the issues in the case. Respondent would inquire into Hatfield's own attitude about his job (a reference to his discharge for cause some months after the events in issue), whether Hatfield had been made whole for loss of pay, and whether the Company advised Hatfield to tender his dues and fees (Br. 10). Whether Hatfield was a good or interested worker, whether he suffered financial loss, and whether he was advised by the Company to tender his dues are all irrelevant to whether on this record the Union could lawfully compel his discharge after he had tendered his dues. We submit that the relevant issues are fairly joined before this Court, that all matters were sufficiently aired before the Board (see R. 21-30 and n. 19, indicating that the Trial Examiner passed upon the waiver issue, and R. 41-42, indicating that respondent raised the issue with the Board), and that the Court should therefore proceed to decide the case without directing an inquiry into the three extraneous matters respondent seeks to inject.

2. Respondent's discussion of "estoppel" and "waiver" (Br. 10-18) overlooks the critical factor, emphasized in our main brief, pp. 19-20, that Gordon acted as respondent's agent in accepting Hatfield into the Union. To say that Gordon was unaware of the Union's determination not to accept Hatfield is simply to place this case on all fours with *N. L. R. B. v. Cement Masons*, 225 F. 2d 168, 171 (n. 3), 174 (C. A. 9), where a union representative took action which bound the union even though, unknown to him, the

union had determined against his taking such action.¹ The suggestion that Hatfield was aware Gordon had no authority to accept him into the Union is unsupported by the record. Dickey's testimony relied on by respondent (Br. 13-14) relates to events before the union meeting (R. 160-161); after the meeting Dickey merely told Hatfield "to talk to the Business Agent" (R. 164), not that Hatfield could not join the Union.²

For the above reasons and for those stated in our main brief, we respectfully submit that the Board's order should be enforced.

JEROME D. FENTON,
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 MARCEL MALLET-PREVOST,
Assistant General Counsel,
 FREDERICK U. REEL,
 MARGARET M. FARMER,
Attorneys,
National Labor Relations Board.

DECEMBER 1958.

¹ As pointed out in our main brief, p. 6, the union membership in this case was kept in ignorance of critical facts when it ratified the demand for Hatfield's discharge.

² The Court's attention is respectfully directed to the related litigation of *Crimmins v. Smith Lumber Co.*, 329 P. 2d 496, 498 (Cal. Dist App.), where the court observed that the complaint "failed to allege facts showing that all of the conditions precedent to the defendant's duty to discharge Hatfield have happened or have been excused." The Union's allegations in the *Crimmins* case are strikingly inconsistent with the facts established in this record. See 329 P. 2d at 497-498.



United States
COURT OF APPEALS
for the Ninth Circuit

IN THE MATTER OF THE BANKRUPTCY OF
VINCENT HALLS DUNCAN and ROBERTA
JEANNE DUNCAN, a marital community, dba V.
H. DUNCAN CO.,
Bankrupt.

ORVAL D. MARKS,
Appellant,

-vs-

J. E. PINKHAM, Trustee in Bankruptcy,
and
HON. O. M. PITZEN, Referee in Bankruptcy,
Appellees.

APPELLANT'S BRIEF

*Upon Appeal from the District Court of the United States
for the Western District of Washington,
Southern Division.*

HON. GEORGE H. BOLDT, Judge.

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JURISDICTION OF THE DISTRICT COURT

The Jurisdiction of the District Court in this case is based on Clause 10 of Subdivision A of Sec. 2 of the Bankruptcy Act (11 USCA Sec. 11 (a) 10 (Tr. 2), the matter going up to the District Court on a Petition for Review of an Order made on or about March 13, 1958,

by the Hon. O. M. Pitzen, Referee in Bankruptcy, which order denied the Petition for Reclamation of a truck and trailer held by the Trustee of the estate of Vincent Halls Duncan, a bankrupt, said order being a "Final Order" within the meaning of Clause 10 of subdivision (a) of Section 2 of said Bankruptcy Act, and the Petitioner having appeared and participated in the hearing from which the order flowed and being a party "aggrieved" thereby.

JURISDICTION OF THE COURT OF APPEALS

The Jurisdiction of the Circuit Court of Appeals to review the Memorandum Decision and Order of the District Court Judge is based on Subdivision (a) of Sec. 24 of the Bankruptcy Act, 11 USCA, Sec. 47 (a) as amended by Amendatory Act of 1938, said Decision and Order being a "final order" appealable under the above statutes.

CONCISE STATEMENT OF THE CASE

This appeal involves validity of chattel mortgage as against Trustee in Bankruptcy, arising out of the following facts:

On or about Sept. 17, 1955, the truck and trailer here in question, was owned by Appellant, Orval D. Marks (Tr. 41), and was physically located in Multnomah County, Oregon, the place of residence of said Orval D. Marks (Tr. 42).

On or about said date, one Carl Duncan and Vincent H. Duncan, in the City of Portland, County of Multnomah, State of Oregon, purchased said truck and trailer from Orval D. Marks, executing all papers, simply as individuals (Tr. 42 and Ex. 1, Tr. 17 at 19 and 20). As part of the same transaction and as a security for payment of the price, Carl Duncan and Vincent H. Duncan jointly executed and delivered to Orval D. Marks a note secured by a chattel mortgage on said equipment and said chattel mortgage was duly recorded in Multnomah County, Oregon (Tr. 42, 17, 20 and 21).

The certificates of title to said equipment were on September 17, 1955, and have at all times since been registered only in the State of Oregon and still are, and the equipment bore Oregon license plates at all times to and including the present (Tr. 20 (a) and 21), no request or effort ever having been made by the Bankrupt to have title to the vehicles registered or have them licensed in the State of Washington (Tr. 96).

After the sale to the Duncans on or about Sept. 17, 1955, a lease was made between the Duncans and Pacific Truck Rentals, and the truck and trailer was used in interstate transportation between Oregon, Washington and California (Tr. 86 to 90 and Ex 4, Tr. 22; Tr. 106), but the terminal point and point of origin and "base of operations" remaining at all times here involved in Portland, Oregon (Tr. 86, 109).

About January, 1956, Carl Duncan and Vincent Duncan had a falling out and Carl endorsed the certificates of title (Tr. 102, 103; 144), at the request of Vin-

cent Duncan to enable Vincent Duncan to control operations but was never released from the mortgage (Tr. 57, 108, 104, 115). Vincent Duncan then cancelled the lease between Carl and Vincent Duncan and Pacific Truck Rentals and signed a new one with Pacific Truck Rentals, which latter company continued the same operation of the truck till about Sept. 30, 1956 (Tr. 156, 158). On or about said date, by mutual consent, the latter lease between Vincent Duncan and Pacific Truck Rentals was cancelled (Tr. 158) and Vincent Duncan thereafter made several trip leases of the equipment to Western Produce Co., Portland, Oregon (Tr. 159, 128-133), and others in Portland, Oregon, who continued to use it in the same interstate hauls, and in part, Vincent Duncan operated it himself in the same hauls (Tr. 86, 88, 159).

From and after Sept. 30, 1956, until bankruptcy intervened, about Sept. 24, 1957, Vincent Duncan, when the truck was not in use or at the end of runs when he was in this area, drove the truck to his home in Tacoma and there parked it (Tr. 86, 87).

Vincent Duncan, the bankrupt, on Sept. 17, 1955, and at all times since, resided only in Tacoma, Washington (Tr. 79); Carl Duncan residing in Oregon (Tr. 56). Appellant Marks claims his mortgage is a superior lien and being in default at the time of bankruptcy, he is entitled to possession for foreclosure. The Trustee contends the mortgage is invalid as to him, never having been recorded in Washington.

At no time from Sept. 1955, till receipt of Notice

of First meeting of Creditors, did Orval D. Marks know that the truck and trailer were "removed" from Oregon to Washington, and he never agreed or consented to such "removal," if in fact there was such a "removal" (Tr. 105 to 109, 49).

CONTENTIONS OF APPELLEES

The Trustee contends that after Sept. 30, 1956, when the second lease (Tr. 158, 159, 132, Ex. 9, Tr. 28), between Vincent Duncan and Pacific Truck Rentals was cancelled and Vincent took possession and operated personally or trip leased to others, the truck and trailer were "removed" from Oregon to Washington, apparently because that was the state of domicil and residence of Vincent Duncan, and contends that under R. C. W. 61.04.090 there has been a "removal" from one county to another county and the lien of Appellant's mortgage has been lost by failure to record the mortgage in the "county" to which "removed."

While it is not absolutely clear, it would seem that the Trustee contended and the Referee found the fact to be that the above statute relates not only to chattels originally located in one county in Washington and mortgaged in that county of Washington, then removed to another county of Washington; but that it is broad enough to cover a situation involving equipment located in another state when originally mortgaged and later brought into the State of Washington.

CONTENTIONS OF APPELLANT

1. That the chattel mortgage given in Oregon on property then located in Oregon and duly recorded in Oregon is universally recognized as valid and superior to subsequent liens, even if the property were subsequently "removed" to the State of Washington.

2. That if it were in fact "removed" such removal was without the knowledge or consent of Appellant and hence the lien is not lost by failure to rerecord.

3. That the recording acts of Washington, R. C. W. 61.04.090 ff relate solely to property originally located in Washington and moved from one county of Washington to another county of Washington, and have no bearing on property originally located out of state and mortgaged out of state before being brought into the State of Washington.

4. That in fact there was no "removal" as that term is understood in the cases.

SPECIFICATION OF ERRORS

(1) The District Court erred in denying Petition for Reclamation.

(2) The District Court erred in holding that R. C. W. 61.040.070 and 61.040.090 applied to this case.

(3) The trial court erred in holding that the equipment had been "removed" to Washington.

(4) The District Court erred in holding, if there was

a "removal" that Appellant had knowledge of such removal or consented thereto, or failed to assert his rights under his mortgage within a reasonable time after such removal.

ARGUMENT

The primary question involved here is whether or not an admittedly valid chattel mortgage given in Oregon on equipment then located in Oregon and recorded in Oregon, said equipment used in interstate commerce from Portland, Oregon, as a base of operation and terminal point of trips, with only occasional and transient trips to Washington, is superior to the interest of the Trustee in Bankruptcy for the mortgagor-bankrupt, or if the mortgage lien has been lost under R. C. W. 61.04.090 because of an alleged "removal."

The law is quite clear:

1. ORIGINAL VALIDITY OF A CHATTEL MORTGAGE IS DETERMINED BY LAW OF SITUS.

"(a) The original validity of a chattel mortgage as a lien on personal property of a bankrupt is governed by the law of the state where the property is located at the time the mortgage is executed and recorded." Clark v. Kramer, 67 ALR 1456; 10 Am. Jur., Pg. 733; 13 ALR 2d 1312 ff.

(b) It is well settled that validity of a chattel mortgage depends not upon the law of the domicile of the owner, but upon the law of the country where the transfer takes place. 57 ALR 702, 704; 13 ALR 2d 1312 ff.

(c) The priority of a chattel mortgage lien over interests subsequently acquired by third parties is to be determined by the law of the place where the property is situated at the time the mortgage is executed. See *In Re Nuckols*, 201 F. 437 and 57 ALR 702, 710; 13 ALR 2d 1312 ff.

(d) The validity of a chattel mortgage is governed by the law of the place where the chattel is situated when the chattel mortgage is made and not by the law of the place where the parties resided. 57 ALR 702; 13 ALR 2d 1312 ff.

(e) *Filing or recording of a chattel mortgage in the state where mortgagor resides at the time of execution is not necessary to protect the lien of the mortgage as against the Trustee in bankruptcy* when the mortgage is recorded in the state where the mortgage was executed and where the property was located at the time. See *In Re: Green* 134 F. 137.

2. THE RECORDING ACTS OF THE STATE OF WASHINGTON DO NOT REQUIRE RE-RECORDING IN WASHINGTON OF A CHATTEL MORTGAGE ON PERSONALTY ORIGINALLY LOCATED AND MORTGAGED OUT OF STATE AND LATER BROUGHT INTO WASHINGTON.

Washington Decisions Advance Sheets, Vol. 150, No. 11, Pg. 307 ff.

3. IF IN FACT THE TRUCK AND TRAILER HAVE BEEN "REMOVED" FROM OREGON TO WASHINGTON (THIS BEING DENIED BY APPELLANT), THEN THE QUESTION OF THE VALIDITY OF THE MORTGAGE AND ITS PRIORITY AS AGAINST THE TRUSTEE IN BANKRUPTCY IS TO BE DETERMINED BY THE SUPREME COURT OF THE STATE IN WHICH THE BANKRUPTCY COURT SITS.

See 6 Am. Jur., Pg. 1121 and *Straton v. New*, 283 US 318.

The Washington Supreme Court, in its most recent pronouncement and which it reviewed all its former decisions on this point of "removal" (Vol. 150, No. 11, Pg. 307 ff of Washington Decision Advance Sheets), held:

(1) There is no requirement under Washington recording statutes, to record in Washington in order to preserve the validity of the lien of a chattel mortgage executed in another state on a chattel subsequently "removed" to Washington, and

(2) As a matter of public policy that a chattel mortgage executed in Oregon and recorded in Oregon on a chattel located in Oregon, is valid and is superior to the lien of an attaching creditor in Washington, after the chattel is "removed" to Washington, provided only that (a) the removal was without the knowledge or consent of the mortgagee, and (b) that the mortgage acts promptly to protect its rights upon discovery of the removal.

Here the facts are almost uncontested that the "removal," if in fact there was one, was done without the knowledge or consent of the mortgagee. The mortgagee unequivocally so testified (Tr. 49, 105 to 109), and the bankrupt admits he never advised appellant of any change in operations (Tr. 92, 160, 89, 90). The only other evidence from the bankrupt was that (a) his address had at all times been Tacoma, Washington; (b) that he parked the truck at his home occasionally, and

(c) that the checks he used to pay mortgagee showed his home address. See also Tr. 86 to 90. At no point in the record can there be found even a scintilla of evidence that bankrupt advised mortgagee of any "removal" or that mortgagee had any knowledge of or gave his consent to any "removal."

Appellant contends that if there was a removal, then on the facts, having no knowledge and having given no consent, on the strength of the pronouncements of the Washington Supreme Court, mortgagee Appellant should prevail.

4. APPELLANT CONTENDS AND URGES MOST STRENUOUSLY THAT THERE HAS BEEN NO "REMOVAL" OF THE TRUCK AND TRAILER FROM OREGON TO WASHINGTON.

The truck was located in Oregon in Sept. 1955 and was there sold to the Bankrupt who gave his note and chattel mortgage back to seller for part of the price. This entire transaction occurred in Oregon, including recording of the chattel mortgage in Oregon.

The Mortgagor-Bankrupt was at that time and at all times since a bona fide resident and inhabitant of Tacoma, Washington, no change of any kind having occurred and the other mortgagor lived in Oregon.

The truck and trailer was at all times licensed in Oregon, the Bankrupt making no move whatever to secure licensing or certificate of ownership in Washington.

The truck and trailer was originally and at all times from date of sale and execution of the mortgage engaged in interstate commerce from Portland as a base of operations.

The cases are clear that use of a vehicle in interstate commerce does not constitute a "removal" to the other states in which the vehicle operates.

Thus the term "removal" is defined as "one of a permanent rather than a transitory nature." See 13 ALR 2d, 1312 at 1335 ff and *Vervais v. Egan*, 226 Ill. App. 500; *Applewhite v. Ethridge*, 187 S. E. 588, 210 N. C. 433 and *Bankers Finance v. Locke*, 170 Tenn. 28, 91 S. W. 2d 297, wherein it was pointed out that "removal" as used in connection with the rule relative to effect of the mortgagees consent to the removal, had a connotation of permanence as distinguished from a temporary or transient removal, and that where there was no permanent removal of the property, the fact that the automobile has been temporarily brought into the state for transient use, with consent of the mortgagee, would not subordinate the lien of the mortgagee to the claim of the local attaching creditors.

"A mortgage validly executed and legally recorded in another state where the property was situated, is entitled to priority over lien of a resident attaching creditor of the mortgagor, notwithstanding mortgage holder's knowledge that the automobile was being used in making regular trips into another state." *Bankers Finance v. Locke*, 91 S. W. 2d 297, 170 Tenn. 28.

"Where a vehicle mortgage is recorded in one state occasional trips across the state line to a neighboring town do not constitute a removal to the other state requiring recording there." *Flora v. Julesburg Motor Co.*, 193 P. 545, 69 Colo. 238.

If the ruling by the Referee, as upheld by the District Court Judge of Review were carried to its

ultimate it would be necessary in every instance to record the chattel mortgage in every state of union and in all the territories and possessions.

Considerable weight must be given, in determining "removal" to the fact that absolutely no effort was ever made to have title to the truck and trailer reissued in Washington, and no effort made to license the equipment there. The titles were and still are Oregon titles and the license plates Oregon plates. Had there been a "removal" to Washington there most certainly would have had to be new certificates of title and licenses issued by the State of Washington.

The pertinent Statutes of Washington State are set forth as follows:

R. C. W. 46.12.010 ff requires a "certificate of ownership" be obtained before a license can be issued and prohibits driving a motor vehicle without a certificate of ownership.

R. C. W. 46.12.030 requires filing of an application showing, among other things, the nature of the applicant's interest and *all encumbrances* and certificate is issued to legal owner and registration only to registered owner, unless same person is both.

R. C. W. 46.16.010 prohibits driving of any motor vehicle in Washington without license, but 46.16.030 exempts non-residents whose vehicle is duly licensed elsewhere on a reciprocal basis," and

R. C. W. 46.16.160 provides "Any commercial vehicle licensed in another state or territory and not

licensed in this state and which under reciprocal relations with that state would be required to obtain a license in this state, may in lieu of a certificate of ownership and license registration *obtain a permit.*"

It is thus clearly evident that had there been a "removal" by the bankrupt to Washington of this equipment, he would have been required to apply for a "certificate of ownership" and a license and would have had to disclose, in his application for certificate of ownership the mortgagee's interest and the certificate of ownership would have been issued to the legal owner and mortgagee.

In this case, the mortgagor simply obtained a "permit" under 46.16.160 and it is evident by his conduct that there was no removal.

In conclusion, the cases and record are clear beyond even a shadow of doubt that the lien of the chattel mortgage is superior to the interest of the Trustee, the Mortgagor (Appellant) having no knowledge of or having given no consent to "removal" and that there was no "removal" at all.

CONCLUSION

The Referee and the District Court Judge both found that since the bankrupt had resided in Washington for over a year before bankruptcy intervened and that the mortgagee knew of such residence and hence there had been a "removal" of the truck and trailer from Oregon to Washington, as the term "removal" is used in R. C. W. 61.04.090.

Here the mortgagor (bankrupt) was a bona fide resident of Tacoma, Washington and domiciled there when he gave the mortgage and he continued to maintain his residence and domicil in Tacoma at all times thereafter until bankruptcy intervened. No change of residence or domicil ever occurred during those times.

If the court can find and hold that there was a "removal" because the mortgagor's (bankrupt's) domicil was in Tacoma for one year approximately before bankruptcy, then it is only reasonable and logical to say he mortgage should have been recorded in Washington the very moment the mortgage was executed, because at that moment the mortgagor (bankrupt) resided in Tacoma and intended to continue to do so, and in fact did so, and all of this was fully known at that time to the mortgagee.

Such conclusion is completely contrary to all the cases herein cited which clearly hold that the validity of the mortgage and the recording requirements are to be determined by the laws of Oregon where the deal was made and the equipment was then located.

Actually, the case is quite simple. The truck and trailer were, in September of 1955, located in Oregon; the deal was made in Oregon and the mortgage recorded in Oregon and the titles were issued in Oregon, as well as the licenses, and the equipment continued to carry Oregon titles and licenses. The truck was used in interstate commerce in Oregon, California and a bit in Washington, but primarily was in Washington only infrequently, when parked by the mortgagor at his home at

the end of runs or when not in use. The trips into Washington were occasional and transient, rather than being taken there permanently. The bankrupt resided in Washington at all times here involved. Mortgagee never knew whereabouts of the truck and never consented to its "removal" and acted at once to recover possession when notified of the bankruptcy, as the bankrupt was then delinquent in a large amount on the mortgage.

Attention is drawn to the unnumbered exhibit called "Partnership Agreement" (Tr. 36). Careful analysis shows principal place of business of the two Duncans as Portland, Oregon. It further provides that it is a preliminary agreement only; an agreement to form a partnership; to be followed later by a formal partnership agreement within 180 days and if final agreement is not made within the time stated, the preliminary agreement was to terminate and *Carl Duncan* was to be sole owner of the business and equipment and Vincent Duncan (the bankrupt) was to be a mere *creditor* of Carl and have lien on the equipment for \$2,000 Vincent advanced as down payment. No final partnership agreement was ever signed (Tr. 147) and Marks (the appellant) never released Carl Duncan from liability on the joint note and mortgage. It is clear from this agreement and the admitted facts, that Vincent Duncan never had title, hence the trustee acquired none. Vincent, and the trustee, were mere creditors of Carl.

Under the law as cited as the facts as admitted, it is clear beyond any reasonable doubt: (1) that there was no "removal," hence no need to record in order to

protect the lien of the Oregon mortgage as against the Trustee; (2) that if there was a "removal," it was without the knowledge or consent of the mortgagee, and he did act promptly to protect his rights under the delinquent mortgage upon discovery of the alleged "removal"; (3) that the trial court is manifestly in error in holding that R. C. W. 61.04.090 governs this situation, since the trial judge is bound by decisions of the Washington Supreme Court and that court has held specifically that the Washington recording acts do not apply to equipment originally located and mortgaged out of the state of Washington and later brought into Washington; and (4) the trial court erred in denying Petition for Reclamation and this court should now correct the errors and order immediate return of the chattels to the mortgagee.

Respectfully submitted,

FRANK L. WHITAKER,
Attorney for Appellant.

No. 16090

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

IN THE MATTER OF THE BANKRUPTCY OF
VINCENT HALLS DUNCAN and ROBERTA
JEANNE DUNCAN, a marital community, dba V.
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BRIEF OF APPELLEES

*Upon Appeal from the District Court of the United
States for the Western District of Washington,
Southern Division*

HON. GEORGE H. BOLDT, Judge

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No. 16090

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

IN THE MATTER OF THE BANKRUPTCY OF
VINCENT HALLS DUNCAN and ROBERTA
JEANNE DUNCAN, a marital community, dba V.
H. DUNCAN CO.,
Bankrupt.

ORVAL D. MARKS,
Appellant,

-vs-

J. E. PINKHAM, Trustee in Bankruptcy,
and
HON. O. M. PITZEN, Referee in Bankruptcy,
Appellees.

BRIEF OF APPELLEES

*Upon Appeal from the District Court of the United
States for the Western District of Washington,
Southern Division*

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CONCISE ADDITIONAL STATEMENT OF CASE:

At the inception of the transaction, the truck and trailer were leased to Pacific Truck Rental Diesel and operated by Carl Duncan until January 20, 1956, out

of Portland, Oregon, (Tr. 42, Ex. 1, Tr. 17, 19, 20) in interstate commerce between Portland, California and also Seattle, Washington (Tr. 86) and this arrangement continued from September, 1955, through to about the end of August, 1956, except for responsibility for and physical operation by Vincent Duncan after January 20, 1956 (Tr. 88, 89). After August, 1956, Vincent Duncan drove the equipment himself part of the time and trip leased to others for part of the time, but at all times when the rolling stock was in a state of rest, that is, not in use or at the end of a trip, the same was brought by him to and remained at his residence at Tacoma, Washington and were so located when bankruptcy intervened (Tr. 87).

“Q Was the truck ever brought to your home until bankruptcy time?

A Was it ever brought to my home?

Q Yes, ever been there before?

A Yes, each trip in.

Q Each trip in?

A Yes.

Q Where was it garaged?

A Well—

Q Over the trips, where was it garaged?

A It was just parked.

Q Where?

A There up in front of my home.

Q Here in Tacoma, Washington?

A Yes.

Q Has that been your habit for sometime past before bankruptcy?

A Yes, sir."

Mr. Marks knew, or should have known, for a period of approximately thirteen (13) months preceding adjudication in bankruptcy of the facts and circumstances, the location of and the nature of the business concerning the truck and trailer (Appendix A) and knowledge of such facts constituted either actual or constructive notice to him throughout that period of time (Tr. 174). The terminal point and point of origin and base of operations did not at all times remain in Portland, Oregon, but changed as indicated in the record to Tacoma, Washington, and there remained for approximately thirteen (13) months preceding adjudication. There were no restrictions upon the removal of the truck and trailer from Portland, Oregon, either express or implied (Tr. 124, Line 21). The original mortgage printed form used by the mortgagee provided for restrictions in area operations but the printed blank was left vacant by the mortgagee who prepared same (Tr. 17, Ex. 1) and no area restrictions were ever placed upon the operations of the truck by the original instrument or as far as the record shows thereafter by the mortgagee or anyone else (Tr. 124, Line 21). The nature of the business in

which the trucks were engaged was hauling produce over the western states (Tr. 124, Tr. 39 e-2). At no time did the bankrupt have any office or place of business or advertise indicating the location of his business was in Portland, Oregon, but on the contrary such facts adduced from the record are to the contrary, (Tr. 64, 65, 79, 84, 85, 146, 147, 164) namely, that Tacoma, Washington, was his only address and he was there contacted in reference to his business, other than the word-of-mouth conversations occurring in Portland when the mortgagee and mortgagor met occasionally (Tr. 100). From the very beginning of the deal to date of bankruptcy, the mortgage was always in default, (Tr. 45, 50, 51) no regular payments having been made as required by the mortgage and note in question. The mortgagee had many occasions in which to exercise his remedies (Tr. 146) over an extensive period of time preceding the bankruptcy, and he was kept fully informed by the bankrupt of all facts concerning the deal and the use of the equipment as he desired to be (Appendix A). The bankrupt at no time concealed or falsified in any way his advices to the mortgagee or concealed the assets involved (Tr. 55, 52, 100, 123).

CONTENTIONS OF APPELLEES

A "removal" in fact and in law occurred with the knowledge and consent of the mortgagee who failed to re-file or exercise diligence thereafter.

1. That by the terms of RCW 61.04.090, in fact and in law there has been a removal of the equipment requiring re-filing or diligent assertion of remedies by mortgagee.

2. That full knowledge and consent of the mortgagee coupled with non-concealment of facts by bankrupt constituted a waiver of his lien by him and Trustee's title is freed therefrom.

3. That under the facts and circumstances of this case the mortgagee failed to use that diligence required of him either to exercise his remedies or to secure the return of the truck to the locality in which it was registered and the mortgage filed, to wit, Portland, Oregon, or to re-file the mortgage in Pierce County, Washington, the residence of the sole operator of the truck.

4. That no error in the Referee's Court or the District Court occurred.

ARGUMENT

The appellee, reframing the question involved here, argues the same to be, whether or not under the facts and circumstances as disclosed by the record, the interest of the Trustee in Bankruptcy for the mortgagor-bankrupt is superior to the mortgage lien claimed by appellant. Inherent in the answer to the above inquiry is the answer to subsidiary questions, namely, was there in fact or in law a removal; secondly, was the appellant charged with actual or constructive notice thereof; and thirdly, was the appellant diligent in the assertion of his rights in the premises after removal.

A removal in fact occurred (See Appendix B). As stated by appellant, the law is quite clear that the original validity of a chattel mortgage is determined by the law of its situs; that if in fact the truck and trailer have been "removed" from Oregon to Washington, then the question of the validity of the mortgage and its priority as against the Trustee in Bankruptcy is to be determined by the Supreme Court of the State in which the bankruptcy court sits, that is, the State of Washington; that the filing acts of the State of Washington do not require re-filing in Washington of a chattel mortgage on personalty originally located and mortgaged out of the State and later brought into Washington, with the exception that where such is done with the knowledge, acquiescence or consent of the mortgagee, or where the mortgagee

fails to use diligence in the assertion of his rights re-filing is required or such lien of the mortgagee is lost.

Where counsel for the respective parties part company is on proposition number 4 argued by counsel commencing on page 10 of his brief. While appellant contends that no removal of the truck and trailer from Oregon to Washington occurred, in the cases investigated and read by appellee's counsel the Courts naturally presumed removal had occurred when the personal property was physically taken from one state to another without explanation, whether or not a legal removal or a factual one was involved or whether there is some form of legal removal which is unrelated to a factual removal. In the following cases the bare facts of physical removal from one state to another was assumed and dealt with as a removal as meant in the present case.

Bankers Finance Corp. v. Motor Co., 170 Tenn. 28, 91 SW 2d 197, 300

Applewhite v. Etheridge, 210 N.C. 433, 187 I.E. 588, 590

Vervais v. Egan, 226 Ill. App. 500, 3rd Dec. Digest 85

Flora v. Julesburg Motor Co., 69 Colo. 239, 193 P. 545

In re Nuckols, 201 F 437

57 ALR 702, 710; 13 ALR 2d 1312 ff.

Surely in the instant case there was considerably more of a removal feature involved than in those cases.

Carl Duncan was eliminated by action of both of the interested parties from any further control, possession or management of the subject matter of the chattel mortgage from and after about January 20, 1956, and the so called silent partner, Vincent Duncan, the bankrupt, then commenced the assertion of his rights, claiming ownership, admitted to be the owner by the mortgagee and exercising rights of possession, control and actual physical possession for at least thirteen (13) months preceding bankruptcy. The habit and custom of bringing the truck to his home for many months preceding bankruptcy at the termination of runs and when the truck was not rolling was an entirely different situation than when Carl Duncan originally had possession and operated and controlled the truck from and after the time of sale and date of mortgage. This is a far different situation than where a piece of rolling stock occasionally makes *transient trips* to Washington as indicated in counsel's argument or to a near-by town in another State on regular trips as mentioned in *Flora v. Jewell Motor Co.* found on page 11 of counsel's Brief.

The situation also varies from the rule cited on page 11 of appellant's argument, to wit, the case of *Bankers' Finance v. Locke*, 170 Tenn. 28, 91 Sw Sec. 297. In the *Locke* case the rule of law contended for again is qualified by the well known exception, "that unless the mortgagee has consented to the removal of the property into

the State, or having knowledge of this removal, had failed to assert rights under the mortgage within a reasonable time", 13 ALR 2d at page 1324.

A "removal" in law occurred. As stated in the argument of counsel for appellant, the latest and most complete expression of the Supreme Court of the State of Washington is found in the case of *Isaacs v. Mack Motor Truck Corp.*, 50 W. 2d 325, 311 P. 2d 663. That case is authority for the holding that where the consent of the mortgagee, apparently either expressed or implied, actual or constructive, to the physical removal of the property from one State to another exists, that a re-filing or compliance with the local statutes relating to filing must be had by him in order to protect and continue his lien; that where knowledge of such removal or consent thereto is absent, the out-of-state mortgage lien is protected; that where a mortgagee, after learning of the new whereabouts of the subject matter delays unreasonably to comply with the laws of the state to which the subject matter is removed or delays unreasonably in asserting his rights to the possession of the property the mortgage lien is lost as against the creditors of the mortgagor. So, on page 329 the Court resolves the rule to be:

"Where personal property subject to a valid chattel mortgage executed in another State, is removed to this State, the lien of the mortgagee will

be superior to that of an attaching creditor of the mortgagor in this State, for goods or services rendered without notice of the chattel mortgage, *only* if the mortgaged property is removed without the knowledge or consent of the mortgagee and he, after learning of its whereabouts, complies with our filing laws or proceeds to assert his rights under the mortgage, without unseasonable delay."

The important dates involved in the Isaacs case are as follows: Filing in Multnomah County, April 2nd, 1952; removal to Washington in the month of April, 1953; date of knowledge of removal, either June 25, 1953 or July 5, 1953; re-filing of the chattel mortgage, July 10, 1953; and commencement of foreclosure proceedings thereunder almost immediately thereafter. The distinguishing characteristics of that case consist of proof that the truck was removed from Oregon without the consent of the mortgagee and the mortgage in that case contained restrictive words which made removal without consent a breach of the mortgage in question. The period of diligence involved therefore is to be computed from the removal date in April, 1953, to July 10, 1953, a period of not to exceed ninety (90) days.

"To 'remove' is 'to transfer especially in order to re-establish' a location, situs, or residence"

Bankers Finance Corp. v. Locke, 170 Tenn 28, 91 SW 2d 297

In that case which was cited by counsel in support of

his contentions that no removal had been had, at page 300, the court stated:

“It” (the car) “was in Lawrence County on ‘a trip’ merely taken by a traveller. It had never, so to speak, come to rest there.”

“Its headquarters, its home place, was apparently that of its driver.”

Upon these holdings the court, concluding that the transitory nature of the event in that case did not constitute removal even though the foreign mortgagee had knowledge of the trip, held the mortgagee’s lien rights superior and preserved.

“The word ‘removed’ as used, implies not only the taking of the property into Virginia, but also the allowing of the property to come to rest therein—the gaining of a situs therein.”

Applewhite v. Etheridge, 210 N.C. 433, 187 S.E. 588, 590.

In this case the North Carolinian mortgagee who had taken the car into Virginia where a Virginia law required re-filing when personalty was brought into the State in order to protect an out-of-state mortgagee, it was held that the mortgagee’s lien was lost in favor of a purchaser of the car in a Virginia re-sale by the mortgagor. The facts as given in the case do not disclose however just what length of time the mortgagor had remained in Virginia whereby a “removal” was accomplished.

The case of *Vervais v. Egan*, 226 Ill. App. 500; 3rd Dec. Digest 85, held that a chattel mortgage of a motor truck is not valid as to third persons, notwithstanding its recordation in Illinois, where the evidence shows that the truck was used and kept outside the state, although it is described in the mortgage as located within the state, and the mortgagor is a non-resident.

The next case cited more closely approximates the facts of the instant case and should be distinguished. In *Flora v. Julesburg Motor Co.*, 69 Colo. 239, 193 P. 545, the facts were that a mortgage given in Colorado by a Nebraska man, who lived eight or nine miles away and across the State line on a farm, for a truck, was recorded in Nebraska, the place of residence of the purchaser-mortgagor. From that point of time on the mortgagor used his truck as a farm truck in an ordinary manner, going to the nearby town across the Colorado border to dispose of his produce and to make purchases and for other ordinary purposes. On some of these occasions he apparently became indebted to a Colorado garageman who asserted his lien after searching the Colorado County records and finding no mortgage was filed. The Colorado court upheld the filing in Nebraska under these circumstances as the proper place for such recordation and as a result thereof held that these ordinary visits into the Colorado town by the farmer under these circumstances was not a removal such as to vitiate the lien of the mort-

gage. This holding was conditioned upon the fact that the sale in Colorado was for immediate removal to the State of Nebraska, the home of the purchaser, within the then knowledge of both parties, and also that it was to be used substantially all of the time in the State of Nebraska. These factors distinguish the holding in the case from that which should prevail in the instant case.

Washington law supports the contemplated immediate removal theory in *North Pacific Bank v. Pacific Mer. Agency*, 153 Wash 37, 279 P. 103, Tr. 39 e-6.

On page 8 of his brief, counsel cites *In re Nuckols*, 201 F. 437 and 57 ALR 702, 710; 13 ALR 2d 1312 ff: In this case, as in the preceding case, it was held that the law of the state where the property was situated at the time and continuously thereafter until the cause of action arose governs where the mortgagor was domiciled and the mortgage was executed in a foreign State. Here the mortgage was recorded in the State where the property (railroad building equipment) was located at the time of execution and again no removal questions are involved in this case.

On page 8 of appellant's brief is found reference to the case of *In re Greene*, 134 F. 137. This case is distinguishable on the facts from the present case and therefore the ruling there obtained is not authority for the ruling which should prevail here. Hotel furniture, never

moved was there involved. The physical location of and filing was had in the proper county in Connecticut. Both parties to the mortgage resided in and executed the mortgage in the State of New York. There was no recording in the State of New York. The cause of action arose in Connecticut. The Court there stated:

“The recordation required by the statute was to preserve the lien as against third party, and the real question is one of priority between lien holders, which must be decided by the law of the place where the property lies and where the court sits which decides the case.”

Appellee agrees that the State of Washington Supreme Court's decision in the Isaacs case must govern in this particular case. Here the mortgage was not recorded in the State of removal and where the action arises, to wit, Washington, the property there was not rolling equipment but was more or less immovable in the hotel and therefore undoubtedly had its situs there. Both parties lived out of the State where the mortgage was recorded and the property located, while here we have a diversity of residence of the parties. There was no question of the removal of the property subsequently from one state to another there involved, the same remaining at all times in Connecticut.

In the case of *Globe, Greene & Mill Co. vs. DeTweede, Northwestern and T. Hypotheekbank*, (1934, C A 9th,

Idaho) 69 F 2d 418, an Idaho statute almost identical in wording and effect as that of the State of Washington was applied in the manner that rule had been interpreted by the Idaho Supreme Court. It was there held that these conflicting rights between parties such as the parties to this appeal will be determined by the principles of comity as applied by the Supreme Court of the state of removal. There the court held that the removal occurring with the knowledge of the mortgagee should be deemed a waiver of the mortgagee's lien upon the principle that where one of two persons will suffer by reason of the wrongful acts of the third person, the injury must be borne by him by whose conduct the wrongful act has been made possible.

From the above holdings it will be seen that the courts are not inclined to be so arbitrary in their holdings as to require, as counsel stated, "it would be necessary in every instance to record the chattel mortgage in every state of the union and in all of the territories and possessions.", (Brief 12), where one merely takes trips into other states in a vehicle without passage of time or the establishment of a situs in the state of removal in order that the mortgagee's lien may be protected therein and such is not the argument of appellee. It is to be presumed that the courts in the future will continue to distinguish between transitory trips and removal involving elements of permanency.

“Whether the policy of this law is good or bad is not for us to say. The matter of the wisdom or good policy of a legislative act is a matter for the legislature to determine. The courts are required to give effect to the legislative acts if it does not violate the constitution.” (13 ALR 2d 1311)

“In this case there is no question of violation of any constitutional provision but only the withdrawing of property rights which would otherwise exist.”

Lee v. Bank of Georgia, 159 Fla. 481, 32 So 2d 7, 13 ALR 2d 1306.

On page 11 of appellant's brief, the contention is made that “removal” indicates a permanent rather than a transitory change. Again the factual situation found in the transcript as determined by the trier of the facts, the Referee in Bankruptcy, and supported by the Memorandum Decision and Order of the District Court, are determinative. If this Court should believe from the facts and circumstances that the equipment here in question was only temporarily brought into the State for transient use, then the rules of law contended for by counsel may be correct. However, the facts and circumstances support a contrary conclusion, namely, that the location of the equipment in the State of Washington was not temporary or transient in nature, but rather as permanent as “permanency” is commonly understood. In fact, it is difficult to determine what additional factors could have been proven to show permanency. It is con-

tended that if a "removal" is found to have existed here, then "Every State has the right to regulate the transfer of property within its limits", *Harvey v. R.I. Locomotive Works*, 93 U.S. 664,667, 23 L. ed. 1003. The recording acts applies to chattels generally, not merely to automobiles, and accordingly a construction peculiarly applicable to motor vehicles is not appropriate, *Fagle v. General Credit*, 122 F 2d 45, 136 ALR 814.

One provision of RCW 61.04.090, namely, that the chattel mortgage could be re-filed upon removal in the nearest custom office is persuasive that the legislators intended the law to cover property brought into the state from abroad.

In the first paragraph of page 13 of appellant's brief it is pointed out that RCW, Title 46, relates to registration and certificates of ownership, RCW 46.16 relates to licensing and in the latter law there is no non-resident requirement in order to secure the permit obtainable. The Director of Licenses is allowed to issue the permit if he so desires under the facts and circumstances. Thus, in this case, even though the bankrupt could have obtained a certificate of ownership and registration under RCW 46.12, he was not required to do so under the latter law relating to licenses and permits and if the Director of Licenses saw fit to issue a permit then he must have been satisfied that the Oregon registration under reciprocal statutes should continue to be honored.

In the State of Washington as well as in the State of Oregon, the registration of motor vehicle requirements have not yet supplanted the requirements of the filing laws. A discussion of the Washington law on this subject is found at 15 Wash. Law Review 182, and this argument of counsel is properly directed to the proper state registration or licensing department for determination as to whether or not a permit only would be issued to Vincent Duncan under these circumstances or whether such department would require re-registration and the re-issuance of Washington State licenses as a prerequisite to operation. It is conceivable that it was physically easier to secure a permit and continue with the registrations already obtained from the State of Oregon or that it was less costly for the operator so to do.

In any event, the argument based upon these laws of Washington are inappropriately addressed to this court since the controversy lies between two private parties claiming adverse interests in the equipment itself. It should be addressed to the registering and licensing authorities of the state of residence of the owner since they are the officials charged with collecting the fees permitted by such laws.

The appellant had every opportunity to know of and did have knowledge of the facts, including the "removal" factor. (Appendix A)

Appellant's testimony was that the mortgagee had *full knowledge* of the location and nature of operation of the truck in question for more than thirteen (13) months preceding the bankruptcy and there was no *concealment* by the bankrupt of any facts inquired into by him. Tr. 44, line 10 to Tr. 45, line 8.

Conversations had between Mr. Vincent Duncan and the mortgagee on the *occasional* trips to Portland that Vincent Duncan made are explained in Tr. 100 by Mr. Marks. The signing of titles and re-issuing of same is shown especially on Tr. 105 by Mr. Marks. Conversations with Vincent Duncan and his wife are indicated on Tr. 108 by Mr. Marks, at which times they would talk over their business. In Tr. 110 Mr. Marks indicated in his answer that he knew when the Pacific Truck Rentals Co. was leasing the truck because its name was on the papers and he knew when it was not leasing because it was signed off the papers, in which transactions he was obliged to take a part and of which papers he had copies or originals of in his possession at all times. This testimony continues for a page or two along those lines terminating at Tr. 111. Mr. Mark's disconnection with Carl Duncan after January of 1956 is shown by his answers found at Tr. 118, lines 1 to 5.

Mr. Mark's lack of inquiry is indicated at Tr. 122, lines 18 to 22. There he was asked:

“Q And never made any inquiry?

A No.

Q You didn't know where the equipment was, or what it was doing?

A No.”

On the question that *a removal in fact occurred*, on Tr. 122, line 24 to Tr. 123 line 4, we find:

“Q Did you have any signed agreement with either Vincent after January of '56 or both of the boys before January '56 concerning the location of their operation?

A All I know is the operation was in Portland.

Q Well, what operation was in Portland?

A Pacific Truck Rental.”

As to Mr. Marks' knowledge of the location of the operation, Tr. 123, line 5 to line 17 clearly indicates that he dealt with Vincent Duncan only out of Tacoma in connection with his business affairs or occasionally saw Vincent Duncan in Portland intermittently. On Tr. 124, line 21, in answer to the question

“Q Now, was there anything outside the written chattel mortgage, was there any other arrangement orally or otherwise, between you and either Carl and Vincent in the first instance or Vincent in the second instance preventing them from terminating their lease with the business firm in Portland,

Oregon and taking the property to the State of Washington?

A There was no basis there."

In reference to the testimony of the bankrupt, Vincent Duncan, Tr. 79, line 3 to line 14 shows definitely the residence and place of business and operation of Vincent Duncan at all times. First Carl Duncan was admittedly a resident of Portland, Oregon, until he left the picture in January of 1956, but from that point on the only person connected with this operation was Vincent Duncan and his residence and place of business was definitely Tacoma, Pierce County, Washington from that time on. In Tr. 84 and 85 is found a description of the way Vincent Duncan operated his business with the location and address thereof at all times and his residence in Tacoma, Pierce County, Washington.

On the question of *permanency of removal*, Tr. 87, lines 10 to 24, clearly indicates that the truck, after each trip in, was taken by Vincent to his home and parked there and that such event had happened for a long time before bankruptcy intervened, in fact, since about May, 1956, Tr. 88, line 2 shows Vincent Duncan had the actual physical possession of the truck from May, 1956 and thereafter. The question was asked of appellant

"Q There had never been any concealment that Carl lived in Portland at that time and Vin-

cent lived in Tacoma throughout this period of time?

A No.

Q Had you ever claimed that Vincent ever lived in Portland or had any other residence than Tacoma, Washington throughout this transaction?

A No.

Q And do you claim or assert that there was any concealment of his residence here in the State of Washington in Tacoma at any time during this sale and chattel mortgage?

A No." (Tr. 55, line 26 to Tr. 56, line 17)

The method of payment by printed check from Vincent Duncan to Mr. Marks after the removal of Carl Duncan from the business venture was known, (Tr. 58, Ex. 3, Tr. 22). On Tr. 59, the question was asked:

"Q Now have you ever in your dealings with Vincent Duncan, leaving Carl out of the picture, seen anything other in the way of a business designation on printed stationery, envelopes or statements?"

And the answer elicited eventually on page 60, was that this printed check, (Tr. 22, Ex. 3) was the only printed matter that he ever saw concerning the firm or Vincent Duncan's operations as a sole trader, except for the name "Duncan" on the side of the truck.

Neither of the Duncans at any time had any established headquarters in Portland, Oregon, (Tr. 64, line

2 to line 23, Tr. 65, line 15 to line 23; Tr. 76, line 2 to Tr. 78, line 9).

Mr. Marks was informed that a partnership existed between the Duncan cousins in the original instance of purchase and mortgage as stated in Tr. 98, line 7 to 10. In either November or December of 1955 Orval Marks forwarded a registered letter both to Vincent Duncan in Tacoma and Carl Duncan in Portland threatening re-possession of the vehicle unless payment was made. (Tr. 146, lines 11 to 15 and lines 22 to 27, Tr. 147 lines 1 and 2.) Tr. 158 shows that after January 1, 1956 all business transactions and payments were made by Vincent Duncan and that Carl Duncan had disappeared from the scene and was not thereafter concerned with the operation in any way, (Tr. 15, lines 1 to 9). The change in the nature of the operation after the cancellation of the Pacific Truck Rentals lease in August of 1956 is explained in the testimony of Vincent Duncan in Tr. 159, lines 9 to 11. In discussing the contacts between Vincent Duncan and Mr. Marks, (Tr. 164, line 12) on cross-examination, the question was asked:

“Q Are you certain whether it was by phone or personally?

A No. I am not, *due to the fact that I talked to Orval many, many times both ways, and I am trying to recall exactly and I can't be honest and say I do.*”

Tr. 165 contains this quotation.

“Q Except for Carl being out of it, the deal is still the same old deal?

A The money was the same and the payments were the same, but it was a new deal.”

Mr. Marks’ knowledge of the serious financial condition of Vincent Duncan from May to August of 1956 is shown in his questions and answers concerning the same, commencing on Tr. 119 and continuing to Tr. 120, line 12.

Concerning the question of *diligence* in asserting his remedies Mr. Marks testified that he did not protest or investigate to see where the truck was operating after July, 1956, (Tr. 121, line 22 to line 24). In Tr. 122, line 18 two questions and answers appear showing lack of diligence, to-wit:

“Q And never made any inquiry?

A No.

Q You didn’t know where the equipment was, or what it was doing?

A No.”

The appellant was not diligent. The Court’s attention is called to the following case which so indicates.

In Robbins vs. Bostian (1943, C A 8th Mo.), 138 F 2d 622, involving a trustee in bankruptcy, the court stated:

“Vendor’s knowledge of the situs of this property in Nebraska and his acquiescence for a period

of five months in that removal, was tantamount, we think, to a consent to the removal.”

and:

“Where the mortgagee under an Indiana mortgage knew for approximately one year before the attachment of the property in Tennessee by the creditors of the mortgagor that the mortgaged property was in Tennessee, and that the mortgagor was financially embarrassed, but took no steps to assert his claim against the property until after it was impounded by the attachment in Tennessee, it was held in *Great American Indem. Co. vs. Utility Contractors* (1937) 21 Tenn. App. 463, 111 SW 2d 901, that the chancellor did not err in decreeing that the attachment was superior to the mortgagee’s lien.”

Therefore, it is seen that this is a factual question only, the rules of law being agreed upon. Was the mortgagee, during the period of twenty (20) months intervening between the re-arrangements made with Vincent Duncan only by the mortgagee or the period of thirteen (13) months intervening between the cancellation of the Pacific Truck Rentals lease, until bankruptcy intervened, during which times the chattel mortgage in question was at all times in default to some extent, during which times the mortgagee was informed upon all the facts he desired to be informed and had actual contacts throughout the period with the mortgagor for the purpose of obtaining further information if he so desired, diligent or negligent in failing to assert his rights and/or secure the return of the truck to the locality where the

filing occurred, to wit, Multnomah County, Oregon, and/or to re-file as required by the Washington statutes?

If the answer to that inquiry is that such period of time of inaction on the part of the mortgagee denotes diligence then of course, the lien of the mortgage will survive and be assertable against the Trustee in Bankruptcy, otherwise the answer must be to the contrary. In the record there is ample evidence that the Trustee's superior position was correctly adjudicated by the District Court. This matter was submitted on written legal briefs by the appellant and the attorney for the Trustee, which briefs were before the Referee at the time of his Decision and Order (Tr. 39 b, c and d). No new argument or further points of law were submitted to the District Court, he, too, having the benefit of the written legal briefs and the Memorandum Opinion of the Referee (Tr. 39e), before him. There are no new legal points raised in the argument before this court which have not been considered and ruled upon after consideration was given to the authorities cited in the same available original briefs.

CONCLUSION

In answer to the conclusions stated in the brief of appellant, appellee contends that RCW 61.04.090 is a statute that applies only to conditions which change after the original transaction between the parties has been completed; that its terms as decided in the Isaacs case apply to the present situation from and after such time as the court determines that a removal has occurred. From that point on the terms of the re-filing statute applies as an exception to the general rule where absence of knowledge, absence of a removal and presence of diligence are involved. It was not necessary originally to record the mortgage in Washington the very moment the mortgage was executed because of the fact that Vincent Duncan then and thereafter continued to be domiciled and resident of Tacoma, Washington, but when the facts and circumstances changed concerning the operation, location and other surrounding factors, then and from that time on the terms and requirements of RCW 61.04.090 commenced to apply and in this case, of course, appellee argues that such period commenced at least thirteen (13) months prior to date of adjudication. Such conclusion is not contrary to the cases cited by appellant herein as indicated by excerpts from the same cases by appellee. The filing requirements are to be determined by the laws of Oregon where the deal was made and the equipment located only as a general rule

and not as an exception to the general rule, as indicated in the Isaacs case.

As stated by counsel, actually, the case is quite simple. The truck and trailer were in September, 1955 located in Oregon; the deal was made in Oregon and the mortgage recorded in Oregon; the title and licenses were issued in Oregon and the equipment continued to carry Oregon licenses and titles and a Washington permit. The truck was used in interstate commerce in Oregon, Washington, California and other Western States and there was no distinction between its operation in and out of Washington and in and out of other states originally, but after the changed circumstances of the parties occurred by the dropping of Carl Duncan and the assumption of the physical possession of equipment by Vincent Duncan, the equipment was in Washington very frequently and as permanently as the nature of the case permitted and was parked by the mortgagor at his home at the end of each run when not in use. The trips into Washington were not occasional or transient, but were of a permanent nature as far as permanency could be injected into this controversy due to the nature of the case. The bankrupt resided in Washington at all times here involved. The mortgagee knew, or should have known about the truck and expressly or impliedly consented to its removal and failed to act in asserting his remedy until notified of the bankruptcy some thir-

teen (13) months after the change of circumstances had occurred. The bankrupt was not only then delinquent in a large amount on the mortgage but had been delinquent in all payments at all times during the continuance of the mortgage obligation.

Reference is made to page 15 of appellant's brief and the argument made in connection with the "partnership agreement" (Tr. 36). Since as stated by counsel "no final partnership agreement was ever signed" (Tr. 147) and the appellant never released Carl Duncan from liability on the joint note and mortgage, it becomes unimportant to consider what may have resulted had a partnership agreement actually been entered into as opposed to the absence of such partnership agreement. In the absence of a partnership agreement, the record shows a joint obligation originally with a signing off as far as was possible by the joint obligee in favor of the remaining obligee and that a two party relationship continued from January 20, 1956 to date of bankruptcy; that Vincent Duncan's name was the sole name on the title as mortgagor thereof. The record is amply punctuated with Vincent Duncan's assertions that he operated and claimed to own the truck continuously to and including his adjudication in bankruptcy. There was no subsequent claim to ownership, title or interest by Carl Duncan.

It may well be that in a proper case the Courts should hold that when A (resident) received a mortgage from B (non-resident) and C (resident) on movable equipment contemplated to be used by either B at his residence or C at his residence, or by either or both elsewhere, that A must at once file his mortgage in both states of residence of B and C in order to preserve his lien against an attaching creditor of either B or C.

It is clear from the record that there has been a removal as meant by the terms of RCW 61.04.090; that it was accomplished with the knowledge, expressed or implied, of the mortgagee; that the mortgagee did not act promptly, or at all, to protect his rights under his delinquent mortgage upon acquiring knowledge of the change of circumstances and the removal until after the adjudication of Vincent Duncan; that the trier of the facts having before him the witnesses and an opportunity to observe their demeanor in testifying was in the best position to place the proper weight to be given to their testimony upon the various factors involved and the District Judge being bound by the decisions of the Supreme Court of Washington felt obligated to sustain the Referee due to the holding of the Isaacs case, which held that under the facts and circumstances of this case re-filing in Washington was a requirement or diligent exercise of remedies must be had in order to protect the lien of the mortgagee. Therefore the trial

court did not err in sustaining the Referee's denial of appellant's Petition for Reclamation and this court should now affirm the decision of the District Judge.

Respectfully submitted,

FRANK L. CATHERSAL
Attorney for Appellee

APPENDIX A

KNOWLEDGE OF MORTGAGEE AND
NON-CONCEALMENT BY BANKRUPT*Testimony of Appellant:*

- Tr. 44 Line 10 to Tr. 45, Line 8
(proposed method of operation)
- Tr. 47 Line 11 to 17
(record of payments received)
- Tr. 48 Lines 20 to 24
(no Washington registration by Duncan)
- Tr. 49 Lines 15 to 17
(mortgage not re-filed in Washington)
- Tr. 52 Line 11 to Tr. 53, Line 16
(general knowledge of business of Duncan)
- Tr. 55 Lines 26 to 56, Line 17
(no concealment of residence)
- Tr. 58
(Tacoma checks received)
- Tr. 59
(No advertising except check and sign on truck)
- Tr. 60
(general nature of Duncan business)
- Tr. 22, Ex. 3
(printed checks—Tacoma Bank)
- Tr. 64 Line 2 to 23
(no Duncan headquarters in Portland)
- Tr. 65 Line 15 to 23
(no Duncan headquarters in Portland)
- Tr. 76 Line 2 to 78, Line 9
(Insurance matters)
- Tr. 100
(occasional conversations in Portland)
- Tr. 105
(Titles signed off—changed in his possession)

- Tr. 108
(business talks with Vincent Duncan and wife)
- Tr. 110 to 111
(knew of lease—on and off papers)
- Tr. 118 Line 1 to 5
(no further connection with Carl after January, 1956)
- Tr. 122 Line 24 to Tr. 123, Line 4
(lease to Pacific Truck Rentals)
- Tr. 123, Lines 5 to 17
(dealt with Duncan at Tacoma)
- Tr. 123, Line 21; also
- Tr. 121, Lines 3 to 9
(no agreement re removal or lease termination)
- Testimony of Vincent Duncan:*
- Tr. 79 Lines 3 to 14
(residence, place of business and nature of operation)
- Tr. 84-85
(Tacoma location)
- Tr. 87 Lines 10 to 24
(after each trip truck taken home and parked)
- Tr. 88, Line 3
(after each trip truck taken home and parked)
- Tr. 89 Lines 1 to 7
(Vincent had physical possession from May 1, 1956)
- Tr. 159 Lines 9 to 11
(free lanced after August, 1956)
- Tr. 164, Line 12
(many telephone and oral conversations)
- Tr. 146 Lines 11 to 15 and Lines 22 to 27
(Registered letter concerning repossession)
- Tr. 147 Lines 1 and 2
(after January 1956 all checks and transactions were with Vincent alone)

APPENDIX B

REMOVAL

Tr. 122, Line 18

("Q And never made any inquiry?")

Tr. 87, Lines 10 to 24

(equipment taken home after each trip and when at rest after May, 1956)

Tr. 88, Line 3

(Vincent Duncan had actual physical possession after May, 1956)

Tr. 100

(Duncan seen on his *occasional* trips to Portland)

Tr. 106-107

(cancellation of lease—no evidence of any new subsequent leases made)

Tr. 122, Line 24 to Tr. 123, Line 4

("Q Did you have any signed agreement with either Vincent after January of '56 or both of the boys before January of '56 concerning the location of their operation?

A All I know is the operation was in Portland.

Q Well, what operation was in Portland?

A Pacific Truck Rental.")

Tr. 123, Lines 5 to 17

(dealings with Duncan at Tacoma)

Tr. 124, Lines 21 to 28

("Q Now, was there anything outside of the written chattel mortgage, was there any other arrangement orally or otherwise between you and either Carl and Vincent in the first instance or Vincent in the second instance preventing them from terminating their lease with the business firm in Portland, Oregon, and taking the property to the State of Washintgon?

A There was no basis there.")

No. 16091✓

United States
Court of Appeals
for the Ninth Circuit

CHARLES W. GRIMM, Appellant,

VS.

CALIFORNIA SPRAY-CHEMICAL CORPORA-
TION, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Northern Division

FILED

OCT 23 1958

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

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Bakersfield, California,

For Appellant.

WILD, CHRISTENSEN, BARNARD & WILD,
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801 Helm Building,
Fresno, California,

For Appellee.

In the United States District Court, Southern Dis-
trict of California, Northern Division

No. 1798—N.D.

CHARLES W. GRIMM, Plaintiff,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPOR-
ATION, a corporation, Defendant.

PETITION FOR REMOVAL OF ACTION ON
GROUND OF DIVERSITY OF CITIZEN-
SHIP

To the United States District Court, Southern Dis-
trict of California, Northern Division:

The petition of California Spray-Chemical Corporation, a corporation, respectfully shows:

I.

That on the 24th day of July, 1957, an action was commenced in the Superior Court of the State of California, in and for the County of Kern, by the filing of a complaint therein entitled Charles W. Grimm, plaintiff, vs. California Spray-Chemical Corporation, a corporation, defendant, being No. 70422 in the files of said Court.

II.

That Charles W. Grimm is the only plaintiff in said action and that at the time of the commencement of said action and ever since the said Charles

W. Grimm has been and now is a resident and citizen of the State of California.

III.

That the only defendant named in said action is California Spray-Chemical Corporation, a corporation, and at the time of the commencement of said action the said California Spray-Chemical Corporation was and at all times thereafter has been and now is a corporation organized under and existing by virtue of the laws of the State of Delaware, and that said corporation is, therefore, a resident and a citizen of the State of Delaware.

IV.

That in said action plaintiff seeks to recover a judgment from petitioner, the defendant therein, in the sum of \$63,764.00. Said action is a civil action wherein the matter in controversy exceeds the sum or value of \$3,000.00, exclusive of interest and costs, and is between citizens of different states.

V.

That summons was served upon petitioner, together with a copy of said complaint, in the County of Contra Costa, State of California, on the 9th day of August, 1957, and this was the date of the first receipt by the petitioner of a copy of said complaint. Attached hereto are copies of the complaint and summons marked Exhibit "A", being all the pleadings, process and orders served on petitioner in said action to the day of the filing of this petition.

VI.

Petitioner presents herewith and files a bond with good and sufficient surety as required by the statutes in such cases, conditioned that it will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

VII.

Petitioner desires to remove said action to this Court as permitted by law.

Wherefore, petitioner files this petition for the removal of said action from the Superior Court of the State of California, in and for the County of Kern, to the United States District Court for the Southern District of California, Northern Division, and prays that said action stand so removed.

WILD, CHRISTENSEN, BARNARD
& WILD,

/s/ By ROBERT M. BARNARD,
Attorneys for Petitioner

Duly Verified.

EXHIBIT "A"

In the Superior Court of the State of California
in and for the County of Kern

No. 70422—Charles W. Grimm, Plaintiff, vs. California Spray-Chemical Corporation, a corporation, Defendant.

COMPLAINT

Plaintiff complains of defendant and for cause of action alleges:

I.

That at all times herein mentioned plaintiff was the owner of a twenty (20) acre peach orchard located upon that parcel of real property situate and being in the County of Kern, State of California, and more particularly described as the South Half of the Southwest Quarter of the Southwest Quarter of Section 32, Township 12 South, Range 19 West. S.B.B. & M.

II.

That on or about January 1, 1957 plaintiff solicited the services of defendant for the purpose of preparing and supplying plaintiff with an insecticide to be used in said peach orchard for the purpose of controlling certain insects known as olive scale, San Jose scale, mites and peach tree twig bore.

III.

That defendant caused an examination of said orchard to be made and became familiar with the conditions there prevailing and for such conditions

Exhibit "A"—(Continued)

prescribed and sold to plaintiff an insecticide presumed to contain medium oil, Mytox and lead arsenic in proportions sufficiently strong to control said bugs and insects but not sufficiently strong to damage or harm the crop of peaches then growing on the trees or the trees in said orchard and defendant did orally warrant and represent that the chemicals and chemical compounds would be fit and proper for such purpose and uses and did orally warrant and represent that the application thereof would not be harmful to or adversely affect said crop.

IV.

That plaintiff did apply the spray to the orchard upon the representations of defendant and in reliance upon defendant's superior knowledge of the quality and quantity of said chemical and chemical compounds and their effectiveness in doing the job for which they were purchased, and upon defendant's superior knowledge of the manner and method of application and the quantities necessary to be used for such purpose, to wit: the destruction, prevention and control of Olive Scale, San Jose Scale, mites and peach twig bore, and of other bugs and insects which might affect and infest said crop and trees.

V.

That but for said representations and warranties made by defendant as aforesaid plaintiff would not have purchased said insecticide or applied said insecticide to said orchard.

Exhibit "A"—(Continued)

VI.

That said representations and warranties were, and each of them was, false; that relying upon said representations and warranties, plaintiff caused said insecticide to be applied to said orchard in the manner and in the proportions prescribed by defendant.

VII.

That as a direct and proximate result of the application of said insecticides 582 out of 1090 trees in said orchard planted to peaches known as "Merrill Jem" variety, and the crop growing thereon, were destroyed, as a result of which plaintiff has suffered damages as follows: \$14,400.00, being the reasonable value of the crop then growing, and a like amount for the next ensuing years which will be required to plant new trees and bring them to bearing, to plaintiff's further damage in the sum of \$43,200.00; \$1,164.00 to remove the damaged tree stumps; and \$5,000.00 to replant said trees and bring them to harvest, all to plaintiff's damage in the total sum of \$63,764.00.

As and for a Second and Separate Cause of Action, Plaintiff Complains of Defendant and Alleges:

I.

Realleges Paragraphs I, II, III, IV, V, and VII of the First Cause of Action by reference.

II.

That defendant was negligent in and about the

Exhibit "A"—(Continued)

selection of the formula used in the preparation of said materials and in the manner in which the materials were mixed and prepared and in the manner in which plaintiff was instructed to use said materials, and as a direct and proximate result of such negligence plaintiff suffered the damages referred to herein.

As and for a Third and Separate Cause of Action, Plaintiff Complains of Defendant and Alleges:

I.

Realleges Paragraphs I, II, IV and VII of the First Cause of Action by reference, and incorporates the same in this Third Cause of Action as though set forth herein in full.

II.

That at plaintiff's request defendant caused an examination of said orchard to be made by its agents and employees and became familiar with the condition of the fruit and trees growing therein, and became familiar with and knew the purpose for which plaintiff intended to use the said chemicals and insecticides so furnished by defendant to plaintiff.

III.

That defendant did then and there by implication warrant that said chemicals and insecticides were in all respects fit and proper for the purpose for which defendant knew plaintiff intended to use them and in reliance on defendant's said warranty

Exhibit "A"—(Continued)

and superior skill, experience and knowledge plaintiff did purchase and use the same.

IV.

That said chemicals and insecticides were in fact unfit and unsuited for the purpose for which plaintiff intended to use the same and did damage plaintiff's fruit and trees as hereinabove alleged; and that within a reasonable time after said damage became apparent and said unfitness was ascertained plaintiff did notify defendant thereof.

Wherefore, plaintiff prays judgment against the defendant for the sum of Sixty Three Thousand Seven Hundred Sixty Four Dollars (\$63,764.00); for costs of suit; and for such other and further relief as to the Court may seem meet and proper in the premises.

CONRON, HEARD & JAMES,
By WAYNE M. HAMILTON,
Attorneys for Plaintiff

State of California,
County of Kern—ss.

Charles W. Grimm, being first duly sworn, deposes and says:

That he is the plaintiff in the above entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge except as to the matters

Exhibit "A"—(Continued)

therein stated on his information or belief, and as to such matters he believes it to be true.

Charles W. Grimm

Subscribed and sworn to before me this 15th day of July, 1957.

Wayne M. Hamilton,
Notary Public in and for said County and State.

[Title of Superior Court and Cause No. 70422.]

ORIGINAL SUMMONS

Action brought in the Superior Court of the State of California, in and for the County of Kern, and Complaint filed in the office of the Clerk of the said Superior Court in and for said County. Conron, Heard & James, Suite 7, Habermfelde Bldg. Arcade, Attorneys for Plaintiff.

The People of the State of California send Greetings to California Spray-Chemical Corporation, a corporation, Defendant.

You are directed to appear in an action brought against you by the above named plaintiff in the Superior Court of the State of California, in and for the County of Kern, and to answer the Complaint therein within ten days after the service on you of this Summons, if served within the County of Kern, or within thirty days if served elsewhere, and you are notified that unless you appear and answer as above required, the Plaintiff will take

Exhibit "A"—(Continued)

judgment for any money or damages demanded in the Complaint, as arising upon contract, or will apply to the court for any other relief demanded in the Complaint.

Given under my hand and seal of the Superior Court of the State of California, in and for the County of Kern, July 24, 1957.

[Seal]

VERA K. GIBSON,

County Clerk and ex Officio

Clerk of Superior Court

/s/ By H. M. FARNSWORTH,

Deputy

[Endorsed]: Filed August 27, 1957.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT, CALIFORNIA
SPRAY-CHEMICAL CORPORATION

Comes now the defendant, California Spray-Chemical Corporation, a corporation, and in answer to plaintiff's complaint admits, denies and alleges as follows:

I.

In answer to the allegations in paragraph 1 of the first cause of action, this answering defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the matters alleged in said paragraph and placing its denial upon this ground, denies generally and specifically all of the allegations of paragraph 1 of the first cause of action.

II.

In answer to the allegations of paragraph 2, 3, and 4 of the first cause of action of plaintiff's complaint, this answering defendant alleges that it did sell to plaintiff an insecticide containing medium oil, mytox and lead arsenic and that said insecticide was sprayed upon certain peach trees by plaintiff on March 5, 1957. Except as so admitted, defendant denies all of the allegations of paragraph 2, 3, and 4 of the first cause of action of plaintiff's complaint.

III.

Defendant denies the allegations of paragraph 5 and 6 of the first cause of action of plaintiff's complaint except that defendant does admit that plaintiff caused said insecticide to be applied to said peach orchard as hereinabove admitted.

IV.

Defendant denies generally and specifically each and every allegation of paragraph 7 of the first cause of action.

V.

This answering defendant denies that plaintiff has suffered any damage whatsoever by reason of any act of omission of this answering defendant and in this connection defendant alleges that any damage suffered by plaintiff in connection with the peach orchard referred to in plaintiff's complaint is and was the result of causes completely unconnected to any act of this defendant or any of the products of this defendant furnished to plaintiff.

Defendant further denies that plaintiff has been damaged in the sum of Sixty Three Thousand Seven Hundred and Sixty Four Dollars (\$63,-764.00) or any other sum or at all.

In Answer to the Second Cause of Action Defendant Admits, Denies and Alleges:

I.

In answer to the allegations of paragraph 1, 2, 3, 4, 5 and 7 of the first cause of action as realleged in paragraph 1 of the second cause of action, this defendant admits and denies said allegations in the same manner and in the same extent that said allegations are admitted or denied in its answer to the first cause of action.

II.

Defendant denies generally and specifically all of the allegations of paragraph 2 of the second cause of action.

III.

This answering defendant denies that plaintiff has suffered any damage whatsoever by reason of any act of omission of this answering defendant and in this connection defendant alleges that any damage suffered by plaintiff in connection with the peach orchard referred to in plaintiff's complaint is and was the result of causes completely unconnected to any act of this defendant or any of the products of this defendant furnished to plaintiff. Defendant further denies that plaintiff has been damaged in the sum of Sixty Three Thousand

Seven Hundred Sixty Four Dollars (\$63,764.00)
or any other sum or at all.

Answer to the Third Cause of Action

In answer to the allegations of paragraphs 1, 2, 4, and 7 of the first cause of action incorporated by reference in paragraph one of the third cause of action, this answering defendant admits and denies the allegations of said paragraph to the same extent and in the same manner that said allegations are admitted and denied in the answer of this defendant to the first cause of action. In answer to paragraph 4 of the third cause of action, this defendant denies, generally and specifically each and every allegation thereof.

II.

This answering defendant denies that plaintiff has suffered any damage whatsoever by reason of any act of omission of this answering defendant and in this connection defendant alleges that any damage suffered by plaintiff in connection with the peach orchard referred to in plaintiff's complaint is and was the result of causes completely unconnected to any act of this defendant or any of the products of this defendant furnished to plaintiff. Defendant further denies that plaintiff has been damaged in the sum of Sixty Three Thousand Seven Hundred Sixty Four Dollars (\$63,764.00) or any other sum or at all.

Wherefore, defendant prays that plaintiff take

nothing by reason of his complaint and that this defendant have his costs of suit incurred herein.

WILD, CHRISTENSEN, BARNARD
& WILD,

/s/ By ROBERT M. BARNARD,
Attorneys for Defendant, California Spray-Chemical Corporation, a corporation.

Affidavit of Service by Mail attached.

[Endorsed]: Filed October 11, 1957.

In the United States District Court, Southern District of California, Northern Division

No. 1798—ND Civil

CHARLES W. GRIMM, Plaintiff,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation, Defendant.

JUDGMENT
(On Jury Verdict)

The above entitled cause came on regularly for trial on April 8, 1958, before the Court and a Jury, the Honorable, Gilbert H. Jertberg, presiding, with plaintiff being then and there represented by Wayne M. Hamilton of Conron, Heard & James, Lawyers, his attorneys of record herein, and with defendant being then and there represented by Robert M. Barnard of Wild, Christensen, Barnard & Wild,

attorneys, its attorneys of record herein; and evidence both oral and documentary having been heard, read and considered, and the Court and Jury having heard the arguments of counsel for both parties, and the Jury having been duly instructed; and after due deliberation having on April 16, 1958, rendered and returned to the Court its verdict for the plaintiff and against the defendant, assessing and awarding plaintiff damages in the sum of Four Thousand Seven Hundred and Fifty Dollars (\$4,750.00);

Now, Therefore, It Is Ordered and Adjudged that plaintiff Charles W. Grimm, have and recover from defendant, California Spray-Chemical Corporation, a corporation, whose principal place of business in the State of California is located at Lucas and Ortho Way, Richmond, California, the sum of \$4,750.00 with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until paid together with his costs of action incurred herein taxed in the sum of——Dollars.

Dated at Fresno, California, this 23rd day of April, 1958.

/s/ GILBERT H. JERTBERG,
United States District Judge

Approved as to Form April 22, 1958.

WILD, CHRISTENSEN, BARNARD
& WILD,

/s/ By ROBERT M. BARNARD,
Attorneys for Defendant

[Endorsed]: Filed April 23, 1958. Entered April 25, 1958.

[Title of District Court and Cause.]

NOTICE OF ENTRY OF JUDGMENT

To: Conron, Heard & James, Suite 7, Haberfelde Bldg. Arcade, Bakersfield, California; Wild, Christensen, Barnard & Wild, Eighth Floor-Helm Bldg., Fresno, California.

You are hereby notified that Judgment in the above-entitled case has been entered this day in the docket.

Dated: April 25, 1958, Los Angeles, California.

Clerk, U. S. District Court
By C. A. SIMMONS,
Deputy Clerk

[Title of District Court and Cause.]

NOTICE OF INTENTION TO MOVE FOR NEW TRIAL ON ISSUE OF DAMAGES

(Rule 59 of F.R.C.P. and Rule 15 of Rules of U. S. District Court, Southern District of California)

To the Honorable Gilbert H. Jertberg, Judge of the above entitled United States District Court, and to Defendant above named, and to Wild, Christensen, Barnard & Wild, its attorneys:

You and Each of You Will Please Take Notice that, Charles W. Grimm, plaintiff above named, intends to and will, on Monday, May 12, 1958, at the court rooms of said Court in the Federal Building

at Fresno, California, at 10:00 o'clock a.m. of said day, or as soon thereafter as counsel can be heard, move said Court for its order vacating and setting aside that portion of the verdict of the jury, heretofore entered herein, and that portion of the judgment, heretofore entered herein, according to said verdict, wherein and whereby said jury fixed and assessed plaintiff's damages in the sum of \$4,750.00, and for said Court's further order granting plaintiff a new trial on the sole and exclusive issue of the extent and nature of plaintiff's damages. Said motion will be made upon the following grounds:

1. Inadequate damages appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify that portion of the verdict fixing plaintiff's damages. (Particulars wherein evidence is claimed to be insufficient are specified in attached Points and Authorities in Part II, under the heading "Amount of Damages Fixed by the Jury Are Inadequate".)

Said motion will be based upon all of the pleadings and documents on file herein, and the minutes of the Court, including, but not limited to, the Clerk's minutes, notes and memoranda made at the time of trial hereof, and kept by the Court, the reporter's record of evidence heard and received, and upon the Points and Authorities attached hereto.

Dated this 1st day of May, 1958.

CONRON, HEARD & JAMES,
/s/ By WAYNE M. HAMILTON,
Attorneys for Plaintiff

Points and Authorities in Support of Motion for a New Trial Limited to the Issue of Damages and Specification of the Particulars Wherein the Evidence Is Deemed Not Sufficient to Support Verdict of the Jury Fixing Damages.

Authorities and argument will be set forth herein on the following points listed in order of presentation:

I. The Court is authorized to grant a new trial on limited issues.

II. The amount of damages fixed by the jury are inadequate and are not supported by the evidence.

III. If the damages fixed in the verdict are less than the undisputed amount proved, or are such as to indicate a reckless disregard for the evidence, or are such as to shock the conscience of the Court, a new trial on the issue of damages should be granted.

IV. A new trial limited to the issue of damages should be granted, where the sum awarded is grossly inadequate, where that issue is distinct and separable from other issues, and where there is no close inter-relationship between the evidence concerning the cause of the injury, and the extent and nature of the injury.

V. If an injustice has been done, it is the duty of the Court to exercise its discretionary powers to correct that injustice.

VI. Conclusion.

I.

The Court is Authorized to Grant a New Trial on Limited Issues.

Rule 59 of the Federal Rules of Civil Procedure, in so far as it is material here, reads as follows:

(a) "A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the Courts of the United States * * *"

Rule 17 of the Rules adopted by the United States District Court of the Southern District of California appears to have been an effort to make more specific the general language of the above mentioned Rule 59, concerning the grounds on which a new trial may be granted. It reads in part as follows:

"(a) The general language of Rule 59 of the F.R.C.P. includes * * * the following grounds:

"(5) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice;

"(6) Insufficiency of the evidence to justify the verdict or other decision."

A new trial may be granted to a party on all or part of the issues where there has been a trial by jury. *Martin vs. Payton*, (D.C. Ky. 1957) 20 F.R.D. 200.

Argument: Rule 59 (a) of the Federal Rules of Civil Procedure, Rule 17 of the Local Federal District Court Rules, and the case cited above, which is one of many that could be cited on this point, leave no doubts that, given a proper case, and the proper circumstances, the Court has the power and jurisdiction to grant to either party, on motion made, a partial new trial limited to specific issues.

II.

The Amount of Damages Fixed by the Jury Are Inadequate and not Supported by the Evidence.

Plaintiff's evidence on the extent and nature of his damages was as follows:

Loss in fair market value—\$5,740.00.

Only two witnesses testified on this issue. John Kovacevich stated that in his opinion Grimm's orchard was worth \$2,200.00 per acre prior to the damage and worth \$1,500.00 after the damage. The difference is \$700.00 per acre.

Charles Grimm testified that in his opinion the orchard was worth \$2,250.00 per acre before the injury and \$1,550.00 after the injury. Again the difference is \$700.00 per acre.

Grimm testified, and this was the only evidence in the record on this issue, that the orchard covered 8.2 acres of land. $8.2 \times \$700.00$ equals \$5,740.00.

Expense of repairing damage—\$1,089.50.

Mr. Grimm was the only person who testified on this issue. In brief, his testimony was as follows:

The unbalanced trees would have to be propped up, and he would need 360 props at 50c each, or a total cost of \$180.00.

The cost of installing and removing props for the estimated 3 years such work would be necessary would be \$200.00. He admits this is simply his best estimate.

The trees would have to be whitewashed for two years to prevent sunburn. He had whitewashed the trees the first time in March of 1958 at a cost of \$90.00. The total cost would be \$180.00.

He would have to pull new limbs into vacant areas by rope ties, or push new limbs into vacant areas by bracing across from old limbs, in order to reshape the damaged trees for shade and balance. This was done at the time the orchard was pruned in late November 1957. Mr. Grimm estimated the cost of this work to have been \$270.00.

It cost Mr. Grimm \$484.50 to cut away, haul, stack and burn the dead limbs. But this included the cost of a power saw purchased for this job at a cost of \$225.00. The cost of this work, less the price of the saw, which he still has, would be \$259.50.

Loss of production in 1957—\$8,398.00.

Grimm had 726 trees in their 5th leaf.

Glenn Moody testified that Merrill Gem peaches in healthy condition should produce 5 to 6 lugs per tree.

Grant Merrill testified that such trees should produce 4 to 8 lugs per tree.

Mr. Grimm testified that he did harvest 1756 lugs

of peaches from his Merrill Gem trees and did sell them for a net of \$3.23 per lug, after his picking, packing and container expense was subtracted from the F.O.B. price.

The average production of the Grimm orchard, based on Moody's evidence, should have been 5.5 lugs per tree, based on Merrill's evidence, it should have been 6 lugs per tree, and based on both Moody's and Merrill's, 5.75 lugs per tree.

If production should have been 5.5 lugs per tree:

726 trees at 5.5 lugs equals 3993 lugs.

3993 lugs less 1756 harvested equals 2237 lugs lost.

2237 lugs lost at \$3.23 per lug equals \$7,225.51.

If production should have been 5.75 lugs per tree:

726 trees at 5.75 lugs equals 4174 lugs.

4174 lugs less 1756 harvested equals 2418 lugs lost.

2418 lugs lost at \$3.23 per lug equals \$7,810.14.

If production should have been 6 lugs per tree:

726 trees at 6 lugs per tree equals 4356 lugs.

4356 lugs less 1756 harvested equals 2600 lugs lost.

2600 lugs lost at \$3.23 per lug equals \$8,398.00.

The defendant argued for a different method of accounting for Grimm's loss of production in 1957. Defendant's contentions, if memory serves me correctly, were as follows:

There were 726 trees in Grimm's orchard.

This is a total of 3630 limbs, at five limbs per tree.

The maximum possible production would have been 8 lugs per tree or 1.6 lugs per limb.

Grimm lost 22 trees entirely; 58 trees had 3 major limbs cut off; 93 trees had 2 primary limbs cut off; and 128 trees had one primary limb cut off. This is a total of 598 limbs lost.

598 limbs should have produced 956.8 lugs, which, at \$3.23 per lug, would have returned him \$3,090.46.

On this method of accounting, Mr. Grimm's damage through loss of production in 1957 was \$3,090.46.

Loss of production during period of regrowth—\$7,330.36.

In 1958 Mr. Grimm's Merrill Gem orchard would have been in its 6th leaf. Both Moody and Merrill testified that the Merrill Gem peach reaches maximum production at the 6th or 7th leaf.

Historic Price Evidence:

Grant Merrill 1957 Net per lug \$2.58.

Glenn Moody 1957 Net per lug \$3.68.

Charles Grimm 1957 Net per lug \$3.23.

Average of all three per lug \$3.16.

The Moody and Grimm harvest dates are 3 to 5 days earlier than Merrill's. Average of Moody and Grimm prices is \$3.45.

Historic Production Evidence:

Grant Merrill 1951 lugs per tree 4.6.

Grant Merrill 1954 lugs per tree 8.4.

Grant Merrill 1957 lugs per tree 7.4.

Glenn Moody 1957 lugs per tree 5.87.

Average production in lugs per tree—6.32.

Using the average net price (after harvest costs have been deleted) of Merrill, Moody and Grimm, and their average production in lugs per tree ($6.32 \times \$3.16$) each tree should return Grimm \$19.97 and each primary limb should return (\$19.97 divided by 5) should return Grimm \$3.99.

Using the average net price of only Grimm and Moody, based on a better price because of an earlier harvest, and the average in lugs per tree ($6.32 \times \$3.45$) each tree should return \$21.80 and each primary limb (\$21.80 divided by 5) \$4.36.

Grant Merrill testified that, in his opinion, the new wood that would have to be regrown to replace the limbs cut out of the Grimm orchard because of the injury to the trees would produce no fruit in 1957 and 1958. In 1959 this new growth would produce 20% of the peaches that the dead limb would have produced, if it had remained on the tree in a normal, healthy condition. In 1960 the new growth would produce 40% of a normal crop; in 1961—60% of a normal crop; and in 1962 the new growth would attain maximum production, or about 80% of a normal crop.

Mr. Grimm testified, and the chart of his orchard (P's Exh. 1) showed that 22 trees were killed or cut back to the stump; on 58 trees 3 primary limbs were destroyed, on 93 trees 2 primary limbs were destroyed, and on 128 trees 1 major limb was destroyed.

Using the Moody-Grimm net price average, the Moody-Merrill production average, and the Merrill schedule of production from the new growth,

Grimm's 1958, 1959, 1960 and 1961 losses are as follows:

1958

22 stumps at \$21.80 each.....	\$ 479.60
488 limbs lost at \$4.36 each.....	2127.68
	<hr/>
Total loss in 1958.....	\$2607.28

1959

Grimm's loss will be 80% of 1958 or.....\$2085.82

1960

Grimm's loss will be 60% of 1958 or.....\$1564.35

1961

Grimm's loss will be 40% of 1958 or.....\$1042.91

Total Temporary Loss in Production.....\$7300.36

If the Merrill-Moody-Grimm price average is substituted for the Moody-Grimm price average, in the above calculations, the loss is reduced by \$618.27 to \$6,682.09.

The defendant produced no evidence on historic prices and production and no evidence on how soon or in what amounts the new growth would produce peaches. However, it should be noted that, through the witness Frank Hornkohl, the defendant did produce some evidence concerning the number of trees on which all growth above the stump had been destroyed and the number of scaffold or primary or major limbs that had been killed. As compared with Mr. Grimm's count, Mr. Hornkohl found a greater number of trees killed back to the stump, but a lesser number of primary limbs destroyed. In argu-

ment, counsel for the defendant stated that the variance between the Hornkohl and Grimm evidence on the amount of destruction was so minor that the jury could ignore Mr. Hornkohl's testimony.

Argument:

The items of damage as calculated by the method used by the plaintiff are as follows:

(1) Loss in Fair Market Value	\$ 5,740.00
(2) Expense of Repairing Damage	1,098.50
(3) Loss of Production in 1957.....	8,398.00
(4) Loss of Production During Period of Regrowth	7,300.36
<hr/>	
Total Damage.....	\$22,527.86

Defendant argued for a different method of calculating item (3). Its calculations result in a loss of production in 1957 of a value of \$3,090.46. If this sum is substituted in the damage account for plaintiff's item (3) the total damage is \$17,220.32.

All of the items of damage as listed in plaintiff's account, including both nature and amount, except item 3, are wholly undisputed either in the evidence or in defendant's argument. Item 3 is wholly undisputed at the sum of \$3,090.46. It follows that plaintiff showed undisputed damages of at least \$17,220.32. In the face of such evidence, and in spite of the absence of dispute, the jury assessed the plaintiff's damages at \$4,750.00. Such sum is grossly inadequate and is not supported by the evidence.

Item (1) is based exclusively on expert testimony.

The remaining items are mixtures of fact and expert opinion. Item (2) is based solely on Mr. Grimm's testimony. The cost of props is factual. The number of props necessary and the cost of putting them out and taking them in is an estimate. The cost of whitewashing the trees is based on fact inasmuch as he has already performed one whitewashing job. The cost of reshaping his trees, which was done at pruning time, is an opinion. A portion of the pruning costs was allotted to the work of tying and bracing. The cost of cutting away, removing and disposing of the dead material is based on fact.

Item (3) is based on the fact that the Merrill Gem peaches that Mr. Grimm did harvest brought a net return of \$3.23 per lug and the expert testimony as to the number of lugs of peaches a Merrill Gem tree in its 5th leaf should produce.

Item (4) in so far as it is based on historic price and production is factual. The schedule of production from new growth is of course expert testimony.

It is familiar law that the jury is not bound by the opinions of experts. It is also familiar law that the power of the jury to ignore either expert testimony or factual testimony is not to be exercised arbitrarily, but must be exercised with sincere judgment, mature discretion, and must be based on sound ground. The amount of the verdict is left to the sound discretion of the jury, but must be just, reasonable and based on the evidence introduced.

The Court will note that in so far as the extent

and nature of the damages to the Grimm orchard are concerned, neither the factual evidence nor the expert opinion evidence was disputed. There was no conflicting expert testimony. Therefore, it is within the shelter of the rule (California Jury Instructions, Civil, B.A.J.I. No. 33-B.) that the jury is not permitted to arbitrarily reject such evidence, unless the same is unreliable or unworthy of belief. *Obold vs. Obold*, (C.A.D.C. 1947) 163 Fed. 2d 23, 33; *United States vs. 76,800 Acres of Land, etc.* (D.C.Ga. 1942) 42 Fed. Supp. 102 (cited and quoted below).

III.

If the Damages Fixed in the Verdict Are Less Than the Undisputed Amount Proved, or Are Such as to Indicate a Reckless Disregard for the Evidence, or Are Such as to Shock the Conscience of the Court, a New Trial on the Issue of Damages Should be Granted.

Where the verdict for the plaintiff was less than the amount of loss shown and not disputed, a motion for a new trial on the issue of damages should have been granted. *Devine vs. Patteson*, (C.A. Ten. 1957) 242 Fed. 2d 828.

A Federal District Court will not invade the jury's determination of the facts, unless their determination was such as to shock the Court's conscience and indicate that there was a gross error or a reckless disregard of the evidence on the part of the jury in fixing the amount. *Tomaine vs. Pennsylvania Railroad Co.*, (D.C. Pa. 1956) 144 Fed. Supp. 445.

Rule 59 of the Federal Rules of Civil Procedure does not authorize the Court to substitute its determination on questions of fact for that of the jury, but does authorize a redetermination of issues for reasons, which in the interests of justice, are compelling. *Benjamin vs. Lehigh Valley R. Co.* (D.C. N.Y. 1950) 10 F.R.D. 154.

The awarding of damages in a grossly inadequate amount is a ground for a new trial. *Spero-Nelson vs. Brown*, (C.A. Ohio 1949) 175 Red. 2d 86.

Where the undisputed evidence showed the plaintiff was entitled to a much greater sum than that to which he was awarded, the trial Court has the duty to set aside the verdict and grant a new trial on plaintiff's motion. *Mahon vs. Bennett*, (D.C. Mo. 1948) 75 Fed. Supp. 666.

The jury may not arbitrarily disregard the testimony of unimpeached witnesses, so far as they testify as to facts, and a wilful disregard of such testimony is ground for a new trial. *U. S. vs. 76,800 Acres of Land, etc.*, (D.C. Ga. 1942) 42 Fed. Supp. 102.

The Judge of a Federal District Court has the power and duty to set aside a verdict against the overwhelming weight of the evidence and to grant a new trial in a proper case. *Magee vs. General Motors Corp.*, (C.A. Pa. 1954) 213 Fed. 2d 899.

Argument.

The point is perhaps being unduly belabored. However, the writer feels that it merits repeating. The plaintiff's evidence, both factual and opinion,

on his damages stands in the record wholly uncontradicted and without conflict. The loss in fair market value is undisputed at \$5,740.00. The cost of repairing the damage is undisputed at \$1,089.00. Assuming that the jury selected the lowest possible production from Merrill Gem peach trees in their 5th leaf and calculated the 1957 loss on the basis argued for by the defendant. (The \$3,090.00 sum is based on an 8 lug production. Merrill testified production should be from 4 to 8 lugs per tree.) and further assuming that the jury might have selected 4 lugs per tree as being the more reasonable. The 1957 loss at absolute minimum would be \$1,545.00. Even the most arbitrary could not conclude that the new growth would produce peaches in 1958. Therefore, the 1958 loss, again at an absolute minimum would be \$1,545.00. Further assuming that it might be concluded that all further losses are remote and speculative, we have an undisputed, conclusively proved loss totaling \$9,919.00.

To award Mr. Grimm only \$4,750.00 for his damages under such circumstances cannot but shock the conscience of persons generally. It indicates an arbitrary and reckless disregard for the evidence.

IV.

A New Trial Limited to the Issue of Damages Should Be Granted, Where the Sum Awarded Is Grossly Inadequate, and There Is No Close Relationship Between Evidence Concerning the Cause of the Injury to the Orchard and Evidence Concerning the Extent of the Injury.

Where damages assessed by the verdict of the jury were grossly inadequate, and there was no need for another trial, on other issues raised, a new trial would be granted as to damages only. *Chesevksi vs. Strawbridge & Clothier*, (D.C.N.J. 1938) 25 Fed. Supp. 325.

A Federal Court has the power to set aside a jury verdict in part and limit the new trial to the issue of damages, if that issue is so separable and distinct from that of proximate cause, that the single issue can be tried without prejudice or injustice. *Bass vs. Dehner*, (D.C. N.M. 1938) 21 Fed. Supp. 567.

Under Rule 59 the Federal District Court has jurisdiction to grant a new trial for inadequacy of damages awarded and should do so when the verdict is so inadequate as to shock the conscience of the Court, awards only nominal damages or is less than the amount of loss, which the defendant did not dispute. *Springer vs. J. J. Newberry Co.* (D.C. Pa. 1951) 94 Fed. Supp. 905; Affirmed 191 Fed. 2d 915.

The practice of permitting a partial new trial may be resorted to only when it clearly appears that the issue to be retried is distinct and separable, and a trial on that issue alone may be had without injustice. *Martin vs. Payton*, (D.C. Ky. 1957) 20 F.R.D. 200; See also *Yates vs. Dann*, (D.C. Del. 1951) 11 F.R.D. 386.

Argument.

Nine witnesses, Hench, Wilson, Hesse, Harper, Weigle, Brown, Thompson, Howard and Sessions,

testified on the issue of proximate cause. Except for Ashley Browne's statement to the effect that, it did not become objectively evident that the orchard was showing some recovery until late August or September, none of these witnesses gave any evidence whatsoever on the extent of the damage to the orchard or the extent of Grimm's losses.

Six witnesses, Kovacevich, Merrill, Moody, Hanna, Hornkohl and Grimm testified on the issue of the extent of the damage to the orchard and the amount of Grimm's losses. If the writer's memory is correct, except for the statement by Merrill and by Hornkohl, that the Merrill Gem peach was more susceptible to oil damage than some other varieties, these witnesses gave no testimony whatsoever on the question of liability or proximate cause.

With the exception of Kovacevich, who was put on out of order, as a matter of courtesy and convenience to him, the order of submission of evidence during the trial demonstrates conclusively that the issues of causation and damage are distinct and separable.

V.

If An Injustice Has Been Done, It Is the Duty of the Court to Exercise Its Discretionary Powers to Correct That Injustice.

In *Southern Pacific Co. vs. Guthrie*, (C.C.A. 9th 1951) 186 Fed. 2d 926, Justice Pope, citing among other cases *Montgomery Ward & Co. vs. Duncan*, 311 U. S. 243, 251, states:

"On such a motion (motion for a new trial) it is

the duty of the judge to set aside the verdict and grant a new trial, if he is of the opinion that the verdict is against the clear weight of the evidence * * * or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict. The exercise of this power is not in derogation of the right of trial by jury but is one of the historic safeguards of that right."

On appeal from an order granting a motion for a new trial, Justice Griffin of the 4th District Court of Appeal, with Justice Barnard and Mussell concurring, stated in *Tice vs. Kaiser Co.*, 102 Cal. App. 2d 44, 46 (1951) as follows:

"It is not only the right, but the duty of the trial judge to grant a new trial when in his opinion he believes the weight of the evidence to be contrary to the findings of the jury. Trial judges have been commended, rather than condemned, for their actions in granting new trials under these circumstances."

Argument.

To send Charles W. Grimm from this Court with the token judgment of \$4,750.00, when the undisputed and conclusively proved minimum loss is \$9,919.00, when a reasonable judgment would be somewhere between \$17,220.00 and \$22,527.00, and the evidence if maximized would support a judgment at a much higher figure, constitutes a miscarriage of justice. Such results, if left to stand, undermines the jury system.

VI.

Conclusion.

In the opinion of the writer this cause was tried by defendant solely on the issue of proximate cause. The extent of the damages suffered by the plaintiff were wholly ignored in the presentation of the defendant's case. The jury's verdict on liability could have gone either way, and it would have been supported by substantial and credible evidence. The witnesses, Hench, Wilson, Hesse, Harper, Weigle and Browne, all testified that the injury to the Grimm orchard was caused by the spray mixture, by an outside source, or by the oil in the spray. The witnesses, Thompson, Howard and Sessions, testified that the spray materials or the oil in the amounts used could not have caused this damage.

On the only contested issue fully and completely tried, the jury brought in a verdict against the defendant. Both the plaintiff's and defendant's order of presentation of evidence clearly demonstrates that the two issues, to wit, causation and extent of damages, are clearly distinct and separable. Each issue can be tried separately without prejudice or injustice to either party.

Inasmuch as the jury was advised by counsel for the defendant to ignore and disregard the testimony of the witness, Hornkohl, in so far as it concerned the extent of the injury to the Grimm orchard, it can be said that not one scintilla of evidence on the issue of the extent of damages and the amount of loss suffered by Grimm was produced by the de-

fendant. At an absolute and irreducible minimum the undisputed loss is more than \$9,000.00. An award of \$4,750.00 is grossly inadequate and is not supportable by the evidence.

The only area when an injustice has occurred is in the amount of damages fixed by the jury. The defendant will not be prejudiced or imposed upon by a new trial on this issue.

When it lies within the discretionary powers of the Court to correct an injustice, and there is sound and reasonable grounds for the exercise of that discretion, the interests of justice compel the exercise of it.

Respectfully submitted this 2nd day of May, 1958.

CONRON, HEARD & JAMES,
/s/ By WAYNE M. HAMILTON,
Attorneys for Plaintiff

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 3, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL BY DEFENDANT

The defendant California Spray-Chemical Corporation, respectfully moves the court for a new trial of the above entitled action upon the following grounds: (1) That the court erred in excluding certain evidence offered by defendant as to the condition of peach trees in Fresno and

Merced Counties in 1957 and that said error was prejudicial to the rights of the defendant. (2) That the verdict of the jury was an improper and invalid verdict in that it was arrived at by compromise and that the verdict was the result of unintentional coercion by the court, and (3) newly discovered evidence which could not, with due diligence, have been presented by the defendant at the trial of this action. Said newly discovered evidence being described in the affidavit of Alwyn C. Sessions filed herewith.

Dated: May 5, 1958.

Respectfully submitted,

WILD, CHRISTENSEN, BARNARD
& WILD,

/s/ By ROBERT M. BARNARD,
Attorneys for Defendant

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF ALWYN C. SESSIONS IN
SUPPORT OF DEFENDANT'S MOTION
FOR NEW TRIAL

State of California,
County of Fresno—ss.

Alwyn C. Sessions, being first duly sworn, deposes and says:

That he is in charge of the Research Department of the Fresno District Office of California Spray-Chemical Corporation and is the same Alwyn C. Sessions who testified in the recent trial in the above entitled action. That since the conclusion of the trial in the above entitled action, he has made an investigation of a condition existing in peach and other stone fruit trees in the Wheeler Ridge and Arvin areas of Kern County, California. That the condition found by the affiant became noticeable in the spring of 1958 after the 1st of April, 1959, and that therefore the evidence of such condition was unavailable to defendant at the trial of this action and could not have been produced by any of the company's representatives at that time.

That affiant has found that a substantial number of peach and other stone fruit orchards in the said area are affected with a pathological condition apparently substantially the same as the condition of the plaintiff Charles Grimm orchard in the spring of 1957, although the orchards hereinafter referred to had not been sprayed with any material that could contribute to this condition. That affiant has not had an opportunity to make a thorough and complete analysis of the condition of each of the orchards hereinafter referred, but states that in his opinion the disease suffered by the said orchards appears to be the same condition as that suffered by the Grimm orchard in 1957.

The orchards to which affiant is herein referring are:

1. Charles Grimm—Substantially adjacent to the Merrill Gem orchard of Charles Grimm, which has been involved in the above entitled action, the said Charles Grimm has in 1958 planted an orchard of over 20 acres of peach trees which are at this time in their first leaf. Affiant is informed and therefore states that this orchard has not been sprayed with any spray whatsoever. During the last 10 days of April, 1958, at the time this orchard was examined by affiant, approximately one-third of the trees in this orchard were exhibiting signs of a condition which appeared to be identical with that suffered by the Merrill Gem orchard in 1957. Approximately one-fourth of said trees have died, or are dying. The cambium layer beneath the bark of the dead and dying branches and trunks exhibit a discoloration and carry the sour smell typical of the condition found in the Grimm orchard in question.

2. Don Barkley—The orchard of Don Barkley, located on Sunset Avenue west of Comanche, is an orchard of Sunrise Nectarines and Robin peaches. This orchard was sprayed in the completely dormant stage with materials known to be entirely harmless to stone fruits. During the last two weeks in April, 1958, the condition of this orchard was called to the affiant's attention, and it was found to have a condition similar to that of the Grimm orchard in 1957. Some of the trees have died, upon some of the trees one or more limbs have died or are dying and a discoloration of the cambium beneath the bark of the trunk and primary limbs is

evident as is the sour smell accompanying such affected orchards.

3. E. O. Mitchell—Comanche Road south of Sunset. This is an orchard of Santa Rosa Plums which was recently called to our attention and which during the spring of 1957 exhibited a condition similar to the Grimm orchard in the same year. The large dead limbs on these trees have not been removed and the pictures taken of this orchard show how severe the condition may become.

4. Giumarra Ranch 489 No. 6—This orchard is near Arvin, California, and is a Santa Rosa Plum orchard, which during the last two weeks of April, 1958, developed conditions which are similar in every respect to that on the Grimm orchard in 1957. This orchard has not been sprayed with any product whatsoever following dormancy. The condition of the trees in this orchard is typical in every respect to the trees in the Grimm orchard and a comparison of the photographs of the two, which are hereafter referred to, shows no substantial variations.

Another Giumarra Ranch orchard located on Wheeler Ridge Road north of Panama Road was also examined by affiant and appears to have suffered from a condition similar to the Grimm orchard. Some of the trees have died, but in general the destruction is not so uniformly distributed in this orchard as was noted in the case of the Grimm orchard.

Affiant states that the year 1958 has been a late

growing spring and for that reason the development of the trees and of these bacterial diseases in Kern and other counties of the valley has been approximately two to three weeks later than the development of the trees and diseases which occurred in the spring of 1957. For this reason most trees in the area were, on or about the 15th of April, 1958, in substantially the same condition of spring growth as were the trees in the month of March, 1957. For this reason, at the time of the trial of this action, to wit, on April 8 through 16, 1958, the condition of the orchards above described (with the exception of the Mitchell orchard) and of other orchards in Kern County had not yet become noticeable evident or serious since such condition is one which becomes apparent following the leafing out and spring growth of the trees.

Affiant further states that he has taken photographs of the orchards hereinabove referred to and that said photographs are available as evidence in a subsequent trial of this matter.

/s/ ALWYN C. SESSIONS

Subscribed and sworn to before me this 5th day of May, 1958.

[Seal] /s/ ROBERT M. BARNARD,
Notary Public in and for said County and State

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 5, 1958.

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR NEW TRIAL ON ISSUE OF DAMAGES ALONE

Defendant California Spray-Chemical Corporation hereby opposes the application of plaintiff for a new trial confined to the issue of damages. Said defendant would not oppose a new trial on all issues and in fact has simultaneously moved the court for an order granting a new trial as to all issues. Opposition to the plaintiff's request for a limited new trial is based upon the following:

That the trial court has the power to grant a new trial on part of the issues is beyond question, and in fact is specifically permitted by court rule, but such a limited new trial should not be granted where substantial justice requires that a new trial, if granted at all, should cover all of the issues. (Keough vs. Maulding, 52 CA 2d 17.)

In the instant case the jury had deliberated from approximately 3:00 o'clock p.m. on April 15, to approximately 3:30 p.m. on April 16 (excluding time for meals and sleep). At this time, four of the jurors announced that the jury was in a hopeless deadlock. Upon being sent back for additional deliberation the jury reached a verdict in approximately thirty minutes. The amount of that verdict, \$4,750.00, has been stated by plaintiff to be hopelessly inadequate. Defendant, of course, feels that

the amount of the verdict is actually more than the plaintiff is entitled to, but defendant does agree with the plaintiff that if the question of liability was to be eliminated, the damages sustained by plaintiff far exceed the sum awarded. Under the authorities, such a verdict is obviously a compromise verdict and it has been many times held that an order granting a new trial as to the question of damages along under such circumstances is an abuse of discretion and reversible error.

In the case of *Southern Railway Company vs. Madden*, 235 F.2d 198, the court stated in part:

“* * * the verdict of \$5,000 was not merely totally inadequate but could have been rendered only as a sympathy or compromise verdict and could not reasonably have been rendered if the jury had found real liability on the part of the defendant. To allow such a verdict to stand as establishing liability while granting a new trial on the issue of damages alone is, in our opinion, not sustainable as a sound exercise of discretion.”

In an earlier appeal in the same case, the court had considered the question of a partial new trial more fully. Although such consideration on the earlier appeal was dicta, the remarks there made were adopted by the court in the second appeal. In the earlier appeal (224 F.2d 320) the court quoted with approval its decision in *Schuerholz vs. Roach*, 58 F.2d 32, as follows:

“It is inconceivable that any jury, having agreed upon the issue of liability, should have

reached such a determination as to damages. They had no right to consider the subject of damages until they had settled the liability in favor of the plaintiff. The verdict itself is almost conclusive demonstration that it was the result not of justifiable concession of views, but of improper compromise of the vital principles which should have controlled the decision. The inference is irresistible that it could have been reached only by certain of the panel conceding their conscientious belief that the defendant ought to prevail upon the merits in order that a decision might be reached. It is possible that a trial judge might let such a verdict stand for various reasons, as for instance if on the whole it should appear to him that a verdict for the defendant ought not to have been set aside. But it would be a gross injustice to set aside such a verdict as to damages alone against the protest of a defendant, and force him to a new trial with the issue of liability closed against him when it is obvious that no jury had ever decided that issue against him on justifiable grounds. Although the decision of a motion for a new trial rests within the discretion of the trial court * * * it is a sound judicial and not an arbitrary discretion which must be exercised. A failure in this regard *in* subject to revision.' " (Underlining, ours.)

One additional statement was made in the Schuerholz case which we should like to quote to the court:

"We are satisfied that in the pending case the

action of the District Court in granting a new trial generally was the only way in which justice could have been done. It is obvious, as the plaintiff contends and the District Judge held, that the sum of \$625 for the loss of an eye was grossly unjust and inadequate. It must have been so regarded by the very jurors who rendered the verdict, and it can give rise only to the inference that it did not represent a fair estimate of the plaintiff's loss, but merely a difference of opinion among the jurors as to the defendant's liability and a compromise of the controversy at the expense of both litigants. Such a finding ought not to stand. It ought to be set aside not only as to damages, but as to liability, for it speaks with no greater authority on the one subject than on the other." (Underlining ours.)

The cases in California are in entire agreement with the Federal cases just quoted. In his work on California Procedure, B. E. Witkin, in considering the problem on page 2088, stated:

"Verdicts are sometimes rendered in personal injury or death actions which, in view of the evidence of injuries, suffering, medical and other expenses, are clearly inadequate. Common experience suggests that these are the result of compromises, some jurors believing that the evidence fails to establish liability, but yielding to the extent of agreement on a small recovery. It would be unfair to the defendant to ignore this unmistakable evidence of

compromise and to accept the verdict for the plaintiff at face value as a determination of liability. Accordingly it is well settled that the error calls for a general new trial, and limited order is an abuse of discretion." (Underlining ours.)

The statement just quoted from Witkin on Procedure is in entire agreement with two recent California cases, the case of Leipert vs. Honold, 39 C. 2d 462 and Hamasaki vs. Flotho, 39 C. 2d 602.

The defendant, therefore respectfully submits that a new trial should be granted in this action for the reason that the verdict of the jury was obviously a compromise verdict and that therefore the issue of liability has not actually been determined. Defendant submits, however, that under the authorities cited above, and the many other authorities consistently taking the same position, the new trial should be on all issues.

Respectfully submitted,

WILD, CHRISTENSEN, BARNARD
& WILD,

/s/ By ROBERT M. BARNARD,
Attorneys for Defendant California
Spray-Chemical Corporation

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 9, 1958.

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES S. PEDEN,
JURY FOREMAN

State of California,
County of Kings—ss.

James S. Peden being first duly sworn, deposes and says:

That he is over the age of 21 years, a citizen of the United States, resides at 1601 North Douty Street, Hanford, California, and was selected the foreman of the United States District Court Jury that heard the action entitled, "Charles W. Grimm versus California Spray Chemical Corporation," starting on April 8, 1958, and ending on April 16, 1958.

That at or about 11:00 o'clock a.m. on April 16, 1958, the twelve jurors reached a unanimous decision to the effect that the damage to the plaintiff's peach orchard was caused by the spray materials used, that is to say that the damage was chemical damage caused by the chemicals in the spray mixture. The jury was, at all times thereafter, unanimous to the effect that the defendant, California Spray-Chemical Corporation, was liable for the damage to Mr. Grimm's orchard.

All discussion after approximately 11:00 o'clock a.m. on April 16, 1958, concerned the amount of damages. The only issue on which the jury appeared to become hopelessly deadlocked was on the issue or question of the amount of loss Mr. Grimm had

suffered. The amount awarded by the jury was a compromise with at least ten members of the jury initially stating that Mr. Grimm was entitled to more than the amount awarded.

/s/ JAMES S. PEDEN,
Affiant

Subscribed and sworn to before me this 16th day of May, 1958.

[Seal] /s/ F. D. BADASKE,
Notary Public in and for said County and State.

Acknowledgment of Service attached.

[Endorsed]: Filed May 19, 1958.

[Title of District Court and Cause.]

AFFIDAVITS IN OPPOSITION TO AFFI- DAVIT OF ALWYN C. SESSIONS

Comes now Charles W. Grimm, plaintiff above named, and in opposition to defendant's motion for a new trial, and especially in opposition to the affidavit of Alwyn C. Sessions, purporting to set forth certain items of evidence, alleged to have been newly discovered, respectfully submits the following affidavits, attached hereto and submitted herewith:

Exhibit 1—Affidavit of W. W. Wright;

Exhibit 2—Affidavit of W. H. Hart;

Exhibit 3—Affidavit of Ray Mitchell;

Exhibit 4—Affidavit of Joe Giumarra with Exhibit A.

And plaintiff further submits, in opposition to defendant's motion for a new trial, the affidavit of James S. Peden, the foreman of the jury that heard the trial of the above entitled cause, which said affidavit is served and filed herewith.

Dated this 16th day of May, 1958.

CONRON, HEARD & JAMES,
/s/ By WAYNE M. HAMILTON,
Attorneys for Plaintiff

EXHIBIT No. 1

AFFIDAVIT OF W. W. WRIGHT

State of California,
County of Kern—ss.

W. W. Wright, being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a citizen of the United States and is one of the co-owners of the Bi-Wright Nursery located at 805 34th Street, Bakersfield, California.

That in January of 1958, Charles W. Grimm did purchase from and through affiant approximately 400 small peach trees of the Springtime Variety. These trees were delivered to Mr. Grimm in February of 1958, and were set out in a five acre plot of ground on his ranch in the Wheeler Ridge area of Kern County, California.

That affiant has on several occasions since February of 1958 examined the above mentioned 5 acres of peach trees on the Grimm ranch and has

submitted samples of the wood, leaves and roots from the trees to others for examination and laboratory inspection. That at affiant's last examination of this lot of trees, some 250 appeared to be dead or dying.

That affiant obtained this lot of trees for Mr. Grimm through the Armstrong Nursery located at Ontario, California. That unknown to affiant at the time of delivery, this lot of Springtime trees were affected with a form of root rot commonly known as crown rot or wet feet, and technically known as phytophthora canker.

Crown rot is a common, well known disease, easily identified. It attacks trees planted in heavy type soils, lacking good drainage, to which excess water is applied, either by irrigation or by rain. These trees were either started or bedded in heavy soil and the excess rain experienced in the spring of 1958 caused this condition to develop before the trees were planted in the Grimm orchard.

Arrangements have been completed to replace all the Springtime peach trees lost by Charles W. Grimm in the spring of 1959.

/s/ W. W. WRIGHT,
Affiant

Subscribed and sworn to before me this 17th day of May, 1958.

[Seal] /s/ WAYNE M. HAMILTON,

Notary Public in and for said County and State.

EXHIBIT No. 2

AFFIDAVIT OF W. H. HART

On Thursday morning, May 8, 1958, at the request of Kern County Agricultural Commissioner C. Seldon Morley, I inspected the young peach and nectarine orchard of Don Barkley, one-half mile west of Mitchell's Corner. Roots were examined from dead or dying trees and from trees which showed one or more dead branches.

Infection by root-knot nematodes, *Meloidogyne* sp., was found to be very severe on most of the trees examined. Root-knot nematode galls were very abundant and many roots were dead as a result of the infection.

The severity of infection, in my judgment, was sufficient to have severely injured these trees, and to have resulted in the poor growth and death of limbs or entire trees which was observed.

/s/ W. H. HART,

Associate Plant Pathologist (Nematology), Bureau
of Plant Pathology, Department of Agriculture,
State of California.

Subscribed and sworn to before me this 8th day
of May, 1958.

[Seal] /s/ EDNA MURPHY,

Notary Public in and for the County of Kern, State
of California.

EXHIBIT No. 3

AFFIDAVIT OF RAY MITCHELL

State of California,
County of Kern—ss.

Ray Mitchell being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a citizen of the United States and one of the Executors of the E. O. Mitchell Estate.

That affiant has read the affidavit of Alwyn C. Sessions, signed before Robert M. Barnard, a notary public, on May 5, 1958, and, from its heading, designed for use in an action filed in the United States District Court, Southern District of California, Northern Division, in an action entitled Charles W. Grimm, plaintiff, versus California Spray-Chemical Corporation, defendant.

That the Santa Rosa Plum orchard referred to in the Sessions affidavit on page 3, lines 3 through 8 is a part of the land farmed by the Estate of E. O. Mitchell and affiant, as a son of E. O. Mitchell, and one of the Executors of his estate, is familiar with that orchard.

That said Santa Rosa Plum orchard is 7½ acres in size. The trees are grafted onto almond root stock, the variety of which is unknown to affiant. It was first planted in 1924. The trees are thirty-four years old, and are at least ten years past their maximum productive life. The orchard is suffering from nothing more than old age and the lack of

expert care and attention, because of declining yields.

As soon as estate matters will permit, it is expected that these plum trees will be pulled out and field crops raised on the land or other tree fruits planted therein.

/s/ RAY MITCHELL,

Affiant

Subscribed and sworn to before me this 17th day of May, 1958.

[Seal] /s/ WAYNE M. HAMILTON,
Notary Public in and for said County and State.

EXHIBIT No. 4

AFFIDAVIT OF JOE GIUMARRA

State of California,
County of Kern—ss.

Joe Giumarra being first duly sworn, deposes and says:

That he is over the age of twenty-one years, a citizen of the United States, and President of the Giumarra Vineyards Corporation.

That the Santa Rosa Plum orchard located on the Giumarra Ranch 489, No. 6 near Arvin, California, referred to in the Alwyn C. Sessions affidavit on page 3, at lines 9 through 17 is in fact a Beauty Plum orchard.

That in March and April of 1958 affiant had this orchard examined by members of the staff of the Kern County Farm Advisor's Office and by members of the staff of the Department of Pomology

of the University of California at Davis, California, and has submitted samples of wood, leaves, roots and soil to said persons for laboratory analysis.

That the conditions in said orchard are caused by nothing more than an accumulation of Sodium Chloride or other soluble sodium salts in the soil in amounts more than Beauty Plum trees can tolerate.

The above fact is proved by reports of the laboratory analysis of soil samples taken and submitted for laboratory examination by Kenneth W. Hench of the Kern County Farm Advisor's Office and by the report of Al Rizzi an Extension Pomologist at the University of California at Davis, California, a copy of which is attached hereto.

/s/ JOE GIUMARRA,
Affiant

Subscribed and sworn to before me this 17th day of May, 1958.

[Seal] /s/ ROBERT MORSE MURRAY,
Notary Public in and for said County and State.

Exhibit "A"

Date: May 1, 1958. To: Kenneth W. Hench. Signed
A. D. Rizzi.

From: A. D. Rizzi, Extension Pomologist.

Enclosed please find the analysis report of the Beauty plum leaves which you submitted on April 14 from the Giumarra Brothers Orchard.

It is quite apparent that the sodium content is in

high excess of what fruit trees can tolerate. We usually find scorch occurring on the leaves at levels of .25 per cent of either sodium or chloride. Below this point sometimes leaf scorch is not in evidence but there may be adverse effects on the trees as far as vigor and ability to size fruit is concerned.

After you have taken the soil samples and the sodium content of the soil is determined it might be worthwhile trying to apply some corrective measures. However I suspect that the conditions that are present in this orchard are the same as we have observed in the past and in other orchards and that by the time the corrective measures will have a chance to show any benefit the grower will become discouraged and remove the trees and go back to row crops operations. However it would still be worth a trial to see what could be done to correct the problem, if it does not include too large a portion of the orchard.

Report of Analysis:

Sheet No. 1, County Kern. Submitted by 4/14/58.
Date: Hench. Grower's name: Guimarra Bros. Variety and kind: Beauty Plum.

Results of Determinations: Field Sample % Dry Weight Basis: K 1.15; Ca 0.86; Mg. 0.21; Na 1.32; P 0.329; Cl 0.19. ppm Mn 75. Lab. No. X3202.

Remarks: Very high sodium. Chloride is high enough to be within critical range. K may be considered low but this is due to antagonism by sodium. ADR.

Acknowledgment of Service attached.

[Endorsed]: Filed May 19, 1958.

In the United States District Court, Southern District of California, Northern Division

No. 1798—ND

CHARLES W. GRIMM, Plaintiff,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation, Defendant.

MEMORANDUM AND ORDER ON MOTIONS
FOR A NEW TRIAL AND ORDER FIXING
DATE FOR RE-SETTING FOR TRIAL

The above entitled cause was tried before a jury commencing on April 8, 1958, and the verdict of the jury was returned on April 16, 1958. The jury returned its verdict in favor of the plaintiff and against the defendant in the sum of \$4,750.00. Judgment on the verdict was entered on April 28, 1958. Within the time provided by law, plaintiff moved this Court for its order vacating and setting aside that portion of the verdict and that portion of the judgment wherein and whereby said jury fixed and assessed plaintiff's damages in the sum of \$4,750.00, and for this Court's further order granting plaintiff a new trial on the sole and exclusive issue of the extent and nature of plaintiff's damages.

Said motion was made upon the following grounds: (1) Inadequate damages appearing to have been given under the influence of passion or

prejudice; and (2) insufficiency of the evidence to justify that portion of the verdict fixing plaintiff's damages.

Within the time provided by law, defendant moved this Court for a new trial on the grounds: (1) that the Court erred in excluding certain evidence offered by defendant as to the condition of peach trees in Fresno and Merced Counties in 1957 and that said error was prejudicial to the rights of the defendant; (2) that the verdict of the jury was an improper and invalid verdict in that it was arrived at by compromise and that the verdict was the result of unintentional coercion by the court, and (3) newly discovered evidence which could not, with due diligence, have been presented by the defendant at the trial of this action. The last ground was supported by affidavit.

The motions came on regularly to be heard by the Court on May 19, 1958. The plaintiff was represented by Conron, Heard and James, Wayne M. Hamilton appearing. The defendant was represented by Wild, Christensen, Barnard and Wild, Robert M. Barnard appearing.

In the amended complaint the plaintiff sought judgment against the defendant in the sum of \$22,-537.86 for damages alleged to have been caused by a chemical spray furnished to the plaintiff by the defendant for application on plaintiff's peach orchard.

Only two issues were submitted to the jury, which were: (1) Did the spray in fact cause any damage or injury to plaintiff's peach orchard? (2) If the

spray did cause any damage to plaintiff's peach orchard, then what was the nature and extent of the damage so caused?

The jury deliberated seven and one-half hours on April 15th and six and one-half hours on April 16th, 1958, before returning its verdict. Approximately forty-five minutes prior to the return of the verdict, several members of the jury, in response to inquiries by the Court, stated that the jury was hopelessly deadlocked and that further deliberations would be fruitless. The Court requested that the jury continue its deliberations and to reach a unanimous verdict, if this were possible without any juror surrendering his honest conviction solely for the purpose of reaching a verdict. The affidavit of the foreman of the jury was submitted at the hearing of the motions for a new trial. The defendant offered only slight affirmative evidence relating to the extent and nature of plaintiff's damages.

I have reviewed the record in this case, and I am satisfied that the undisputed evidence established that the plaintiff suffered minimum damages in the sum of \$9,919.00 which figure resolves all doubt as to the extent of damages against the plaintiff. Therefore, I am satisfied that the verdict of \$4,750.00 was inadequate under the evidence in this case, and in the language of the counsel for the plaintiff, indicates arbitrary and reckless disregard of the evidence.

As stated above, plaintiff, in his motion, seeks only a partial new trial—a new trial limited only

to the issue as to the extent and nature of the damages. It is my view, however, that under all of the circumstances of this case, a new trial should not be limited to the issue of damages, but should be had on both of the issues which were submitted to the jury. In my view of the evidence the causation of the damages was a difficult and close issue for the jury to decide. The verdict of the jury with respect to damages seriously undermines the integrity of the decision of the jury with respect to causation. It is not convincing to me to argue that the jury considered the evidence relating to causation with sincere judgment, in accordance with the law and the evidence, and that on the issue of damages its verdict was in reckless disregard of the evidence. The affidavit of the foreman of the jury does not answer the dilemma created by the inadequate verdict on damages.

To me, the gross inadequacy of the verdict of the jury on damages is quite convincing that the jury did not give proper consideration to the evidence on the issue of liability. A motion for a new trial is addressed to the sound discretion of the Court. It is the duty of the Court to see that both parties to litigation receive a fair and impartial trial, based upon the law and the evidence. In order to accomplish this duty, I feel that a new trial must be granted on the two issues which were submitted to the jury. I feel that I have the power to do so, even though the plaintiff has restricted his motion for a new trial only on the issue of damages.

Accordingly, It Is Ordered and Decreed that the

verdict of the jury heretofore entered herein, in its entirety be and the same is hereby vacated and set aside, and that a new trial be and the same is hereby granted on all issues which were submitted to the jury. It is further ordered that the defendant's motion for a new trial be and the same is hereby denied. It is further ordered that the above entitled cause is hereby placed on the calendar to be called Tuesday, July 8, 1958, at 10:00 a.m. for the purpose of setting this case for trial before a jury.

The Clerk of this Court is directed to forthwith mail copies of this memorandum and orders to all counsel.

Dated: May 22, 1958.

/s/ GILBERT H. JERTBERG,
Judge U. S. District Court

[Endorsed]: Filed May 22, 1958.

[Title of District Court and Cause.]

NOTICE OF INTENTION TO APPEAL AND OF APPEAL

Comes now Charles W. Grimm, plaintiff above named, and hereby gives notice of his intention to appeal, and does hereby appeal to the United States Court of Appeals for the Ninth Circuit from, solely and exclusively, that portion of the Trial Court's "Memorandum and Order on Motions for a New Trial and Order Fixing Date for Re-Setting for Trial," made and filed in the above entitled cause

on May 22, 1958, wherein and whereby the following orders were made and entered:

1. That the verdict of the jury heretofore entered herein, in its entirety be and the same is hereby vacated and set aside;

2. And that a new trial be and the same is hereby granted on all issues which were submitted to the jury.

/s/ CONRON, HEARD & JAMES,
/s/ By WAYNE M. HAMILTON,
Attorneys for Plaintiff

[Endorsed]: Filed June 6, 1958.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Whereas, Judgment was entered in the above-entitled action on the 25th day of April, 1958, in the United States District Court, Southern District of California, Northern Division, in favor of plaintiff, Charles W. Grimm, and against defendant, California Spray-Chemical Corporation, a corporation;

And Whereas, plaintiff-Appellant, Charles W. Grimm, did thereafter on or about the 2nd day of May, 1958, move said United States District Court for a New Trial solely and exclusively on the issue of the extent and nature of plaintiff's damages;

And Whereas, on the 22nd day of May, 1958, the above-entitled United States District Court did make and enter its Order Denying Plaintiff's Mo-

tion for a New Trial on limited issues and did grant a new trial on the issue of causation as well as the issue of the extent and nature of plaintiff's damages, and plaintiff, Charles W. Grimm, feeling himself aggrieved by said Order Granting a New Trial has prosecuted his appeal to the United States Court of Appeals for the Ninth Circuit from said Order;

New, Therefore, Phoenix Assurance Company of New York, incorporated under the laws of the State of New York and authorized by the laws of the State of California to execute bonds and undertakings as sole surety, and having an office and usual place of business at Bakersfield, Kern County, California, as Surety, hereby undertakes in the sum of \$250.00 that if the Order so appealed from is affirmed, or the appeal is dismissed, the appellants shall pay to plaintiff all costs awarded against it on said appeal, or such costs as the appellate Court may award if the judgment be modified.

Dated: June 3, 1958.

[Seal] PHOENIX ASSURANCE COMPANY
 OF NEW YORK, a Corporation,
/s/ By RAY LOBRE,
 Its Attorney-in-Fact

Affidavit of Certification attached.

[Endorsed]: Filed June 6, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 59, inclusive, containing the original:

Judgment.

Clerk's notice of entry of judgment (copy).

Notice of intention to move for New Trial on issue of damages.

Motion for New Trial by Defendant.

Affidavit of Alwyn C. Sessions in support of Defendant's Motion for New Trial.

Defendants Memorandum in opposition to Plaintiff's Motion for New Trial on issue of damages alone.

Affidavit of James S. Peden, Jury foreman.

Affidavits in opposition to Affidavit of Alwyn C. Session.

Memorandum and Order on Motions for a New Trial, etc.

Notice of Intention to Appeal and of Appeal.

Designation of Contents of Record on Appeal and Statement of Points.

Designation of Additional Portions of Record on Appeal by Defendant.

B. Five volumes of Reporter's Official Transcript

of Proceedings had on: April 8, 9, 10, 11, 15 and 18, 1958.

I further certify that my fee for preparing the foregoing record, amounting to \$1.60, has been paid by appellant.

Dated: July 14, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk
/s/ By WM. A. WHITE,
 Deputy Clerk

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the Supplemental Transcript of Record on Appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled matter:

A. The foregoing pages numbered 1 to 17, inclusive, containing the original:

Petition for Removal of action on ground of Diversity of Citizenship.

Complaint, attached to Petition for Removal (copy).

Answer of Defendant California Spray-Chemical Corp.

Supplemental Designation of Contents of Record on Appeal.

I further certify that my fee for preparing the

foregoing record, amounting to \$1.20, has been paid by appellant.

Dated: August 19, 1958.

[Seal] JOHN A. CHILDRESS,
 Clerk
 /s/ By WM. A. WHITE,
 Deputy Clerk

In the United States District Court, Southern District of California, Northern Division

No. 1798—ND—Civil

CHARLES W. GRIMM, Plaintiff,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation, Defendant.

TRANSCRIPT OF PROCEEDINGS

Fresno, California, April 8, 1958

Before: Honorable Gilbert H. Jertberg, Judge presiding.

Appearances of Counsel: For Plaintiff: Conron, Heard & James, by Wayne M. Hamilton. For the Defendant: Wild, Christensen, Barnard & Wild, by Robert M. Barnard. [1*]

* Page numbers appearing at top of page of Reporter's Transcript of Record.

Fresno, California, Tuesday, April 8, 1958. 10 a.m.

(A jury was duly empaneled and sworn.)

(Opening statement by Mr. Hamilton.)

(Opening statement by Mr. Barnard.)

Mr. Hamilton: We will call Kenneth W. Hench.

KENNETH W. HENCH

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Kenneth W. Hench.

The Clerk: Have that seat.

Direct Examination

Q. (By Mr. Hamilton): Your name is Kenneth W. Hench, is that correct? A. Yes, sir.

Q. Where do you reside, Mr. Hench?

A. 216 North Stern Road, Bakersfield, California.

Q. What is your business or occupation?

A. I am farm adviser employed by the Agricultural Extension Service of the University of California.

Q. Do you work out of the Farm Adviser's office of Kern County? A. Yes.

Q. Mr. Hench, what is the general type of work that you [3] do in your employ as a member of the staff of the Farm Adviser of Kern County?

A. Well, in my realm of work I am concerned with all horticultural crops, other than vegetable crops, in the County of Kern. It is my job to assist

(Testimony of Kenneth W. Hench.)

and advise farmers in problems pertaining to primarily tree crops, and vine crops, ornamentals, things of that nature.

The Court: May I suggest, let's all keep our voices up so the juror farthest away and counsel and everybody in the court room can hear, so if you will make an effort to do that, please.

Q. (By Mr. Hamilton): I take it from what you said, Mr. Hench, that part of your specialty in the Farm Adviser's office is in tree fruit?

A. Yes, sir, that is correct.

Q. Mr. Hench, where were you educated?

A. I received my Master of Science degree from the State College in Washington, Pullman, Washington.

Q. And what was that degree in?

A. The degree in agriculture; of course my major in horticulture.

The Court: Can all the jurors hear the witness? It is important that every juror hear everything that every witness says, so if at any time you don't hear either counsel's [4] question or the witness' answer, let me know, indicate it, because I want to be sure everybody hears everything that goes on. All right.

Q. (By Mr. Hamilton): When did you receive your Master's degree? A. In 1948.

Q. And did you go from there direct to the Kern County Farm Adviser's office?

A. No, sir, I—following my graduation I worked one year with the Agricultural Research

(Testimony of Kenneth W. Hench.)

Department of the Hawaiian Pineapple Corporation on the Island of Oahu. Following that I worked seven years for the New Mexico College of—A. & M. College, in—State College in New Mexico, as an instructor and a research worker.

Q. Did you say instructor and research worker?

A. Right.

Q. Did you have anything to do with peaches while you were employed by the New Mexico State College of Agriculture?

A. Yes, sir, I cooperated with the research work done there with peaches.

Q. Did the college have its own experimental peach orchard? A. Yes, sir.

Q. And how long have you been with the Kern County Farm Adviser's office? [5]

A. Two years last February.

Q. Are you acquainted with Charles W. Grimm?

A. Yes, sir, I am.

Q. Are you acquainted with various growers of Merrill Gem peaches in Kern County?

A. Yes, sir.

Q. Who are some of those other growers besides Mr. Grimm?

A. Well, there is the Grant Merrill orchard in Weed Patch—you want the names of them?

Q. Yes.

A. Kovacevich orchard—how many do you want me to name?

Q. Any more that come to your mind?

(Testimony of Kenneth W. Hench.)

A. Glen Moody orchard, Wheeler Ridge, the Ike Peters orchard near McFarland.

Q. Have you been in all of those orchards that you have named? A. Yes, sir.

Q. Had you been in all of those orchards, including Mr. Grimm's, prior to 1957?

A. Yes, sir.

Q. Prior to March of 1957, when were you last in Mr. Grimm's peach orchard?

A. I was in his orchard on February 27, 1957.

Q. At the time of your visit to that orchard on [6] February 27, 1957, how would you characterize the condition of that orchard using these terms: excellent, good, fair and poor?

A. I would characterize the condition as excellent.

Q. On that day did you notice any evidence of any disease of any kind? A. No, sir.

Q. In that orchard? A. No, sir.

Q. Did you notice any bad condition of any trees in that orchard? A. No, sir.

Q. After March 5th of 1957 when were you next in Mr. Grimm's peach orchard?

A. I was in his orchard on April 14th.

Q. That was 1957? A. 1957, right.

Q. And you had not been to the orchard between February 27th and April 14th of 1957, is that correct? A. That is correct.

Q. What was the condition of Mr. Grimm's Merrill Gem peach orchard as you observed it on April 14th?

(Testimony of Kenneth W. Hench.)

A. Well, of course, I was notified that something was wrong with his orchard, by one of my co-workers in the department. I had been out of the county for about a week prior [7] to the 14th, and when I returned I was notified by one of my co-workers that there was something wrong with his orchard and so I immediately went out there. It was on a Sunday, April 14th, and made a personal evaluation of the condition in the orchard and at that time I noticed extensive damage to the trees.

Q. Describe as best you can the condition of the trees as you saw it on that day?

A. Well, I noticed that the primary damage was confined mainly to the southern and southwestern sides of the trees. In many cases the scaffolds, the main branches on the north side of the trees showed no injury at all. You had a condition that was mainly on the side of the tree that was exposed more directly to the sun light, and there was quite a large percentage of the trees affected. There were some much more so than others.

Q. By bad condition, do you mean that the leaves were wilting, the leaves were dead, the leaves were falling? What was the condition of the foliage?

A. The leaves were wilted, and the tissue of the trees, primarily older wood, showed evidence of extreme injury of some sort.

Q. Now, did you walk through all of the Merrill Gem peach orchard? A. Yes, sir. [8]

Q. What else did you do by way of examination,

(Testimony of Kenneth W. Hench.)

other than to walk through it and to visually observe the trees?

A. Well, I checked the root system of the trees.

Q. Did you dig down and expose roots?

A. Yes, sir. Found no injury there. Checked the crown, or the portion of the trees just above the soil line; found no injury there. Found no apparent injury to the young wood.

Q. By young wood, what do you mean?

A. Well, wood that was laid down the previous year.

Q. In other words, that would be wood one year old or less?

A. Your fruit bearing wood.

Q. And when you use the term old wood, you refer to wood that was two years old or older, is that correct?

A. That is correct.

Q. Did you strip the bark from the limb?

A. Yes.

Q. Did you strip the bark from branches or twigs?

A. Yes.

Q. What did you observe, if anything, that was abnormal about the area of the plant material below the bark?

A. Well, there was quite a bit of killing of tissue in the affected portions, actually necrosis of the wood.

Q. You use the term necrosis. That means dead or dying, [9] is that correct?

A. That is right.

Q. How did you, by looking at it, determine

(Testimony of Kenneth W. Hench.)

that a bad condition existed? Was there a difference in color, difference in smell, in taste?

A. There was a difference in color of the bark and of the tissue. I cut in through the cambium layer of the wood and viewed the wood itself, and naturally when you have an abnormal darkening of the tissue, why, you know something is wrong.

Q. In other words, the condition that you observed was an abnormal darkening of the wood?

A. That is right.

Q. And would that condition also be applicable to what you refer to as the cambium?

A. Yes.

Q. What is the cambium, Mr. Hench?

A. Well, the cambium layer in plants is that area beneath the bark, just immediately beneath the bark of the tree which is the active growing area of your plant. It is commonly called the new genetic cells, that give rise to new cells which enlarge and increase the tree in diameter, and also it gives rise to your tissue, which we call vascular tissue, the valves and phloem; the phloem is important to transportation of food from the leaf, from the manufacturing [10] area of the leaf down to the roots. Ordinarily your xylem, the vascular system which carries your water and your mineral elements into your *tree*, and both of those vascular systems must remain healthy in order for the tree to stay alive and continue to be healthy.

Q. Would it be fair to say, Mr. Hench, that the cambium layer is the layer of growth, of life

(Testimony of Kenneth W. Hench.)

for the tree? A. That is right.

Q. Did you find any evidence of any disease or bad condition in the roots?

A. No, I did not find any apparent abnormality whatsoever in the roots.

Q. On the areas above the ground, and the areas where you found this darkening of the cambium layer, would that darkening completely girdle the branch, or would it be part way round, or what did you observe?

A. It was varied; you had all degrees of girdling. By girdling, I mean the complete destruction of your cambium layer clear around the branch or the trunk, or your scaffold; you had all degrees of that injury.

Q. On the day that you were there, Mr. Hench, on April 14th, was there any fruit remaining on the branches or limbs that appeared to be seriously affected?

A. Yes, there was still some fruit persisting on the trees. However, it was just holding there, it was not growing, [11] being supported mainly by the life in the wood itself. There was a set of fruit on these branches and it persisted on the trees, the fruit did persist on the trees, but were not growing in a normal fashion like the fruit on unaffected trees were growing.

Q. Did you see anyone at the Grimm orchard on April 14th? A. No, I did not.

Q. Mr. Grimm was not there with you?

A. No.

(Testimony of Kenneth W. Hench.)

Q. And no other person was with you?

A. No.

Q. Mr. Hench, did you at the time that you made this visit on April 14th know anything of Mr. Grimm's prior spray program?

A. I was told of his spray by my co-worker.

Q. I see. You were not informed of any spray program by Mr. Grimm? A. No.

Q. Then your knowledge of the prior spray program at that time was purely hearsay?

A. That is right.

Q. On this visit, and from what you have stated of your examination and what you found, Mr. Hench, was there anything, any condition, any symptom, any characteristic that you observed, that caused you to believe that there was any [12] pathogenic or infectious disease in the orchard?

A. Well, by the pattern of the injury it did not, in my opinion, appear to be a pathogenic disease. However, I wasn't certain.

Q. Now, by the use of the term pathogenic, what do you mean?

A. Meaning disease or mal function of your plant caused by an organism of some sort or other, whether it be bacteria, fungus or virus.

Q. In other words, by the term pathogenic you mean the flu bug type of disease carrier?

A. Well, I guess you could use that.

Mr. Barnard: I didn't hear that.

The Court: You have got to keep your voice up.

A. Yes, I imagine you could use that.

(Testimony of Kenneth W. Hench.)

Q. (By Mr. Hamilton): Bacteria, virus and fungus. A. Yes.

Q. At the time of this April 14th visit, Mr. Hench, did you form any conclusion or opinion as to what was the cause of the condition of the Grimm orchard?

A. No final opinion at that time.

Q. Did you form any opinion at all?

A. Yes, I believe I did.

Q. And what was that opinion? [13]

A. Well, I thought at the time it was probably associated with the spray.

Q. Did you at the time of this April 14th visit, Mr. Hench, gather some material from the Grimm orchard for the purpose of further examination of it? A. Yes, I did.

Q. How did you select the material that you did gather?

A. Well, I selected representative specimens from all sizes of wood, cut it off the trees, and placed them in a polyethylene bag, so it would not dessicate or dry out, and would be kept in a normal condition for future examination; collected that and carried it with me at that time.

Q. At that time what was it your intention to do with that material?

A. I intended to mail it to the extension pomologist at the University of California at Davis for diagnosis.

Q. Did that material eventually get to the University of California at Davis? A. Yes.

(Testimony of Kenneth W. Hench.)

Q. What was the means by which it got there?

A. The following Monday Dr. Proebsting from the department of pomology came through and stopped off for a short visit in the department there at Bakersfield, and I discussed the matter with him briefly, and told him that I was going to mail it to the University, and he said, "well, I am going [14] right up, I will take it with me," so he took the material with him up to the University of California.

Q. And did you later receive a report from the University of California at Davis concerning that material?

A. Yes, sir, I did.

Q. And who was that report given by?

A. Dr. Wilson of the department of pomology—I beg your pardon, director of plant pathology.

Q. After receiving that report, did you do anything further concerning efforts to try to discover what was wrong with the Grimm orchard?

A. Yes.

Q. What did you do, Mr. Hench?

A. Of course, immediately contacted Mr. Grimm and showed him the contents of that report. I made another visit to the orchard on the 19th of April, and following that I contacted Mr. A. D. Rizzi, who is the extension pomologist of the University of California at Davis.

Mr. Barnard: Excuse me. Mr. Hench, could you spell that name?

The Witness: R-i-z-z-i. Contacted Mr. Rizzi and

(Testimony of Kenneth W. Hench.)

asked for his help, personal help in looking over the trees.

Q. (By Mr. Hamilton): Did Mr. Rizzi come down?

A. Yes, he agreed to come down, and they flew down by [15] plane on April 25th. He was accompanied by Dr. Richard Harris of the department of pomology, and Dr. Hesse of the—who is chairman of the department of pomology.

Q. Did you take these gentlemen from the airport to the Grimm ranch? A. Yes.

Q. And did the four of you meet anyone at the Grimm ranch? A. Yes, we did, met——

Q. Who did you meet?

A. Met Mr. Grimm.

Q. Was Mr. Grimm there when you arrived at his ranch? A. Yes.

Q. Did you, Dr. Harris, Dr. Rizzi and Dr. Hesse and Mr. Grimm make an examination of the Merrill Gem peach orchard? A. Yes.

Q. Can you describe briefly what was done by way of examination?

A. Well, we went through and examined practically all the affected trees in the Merrill Gem orchard. By use of knives we cut into the branches, through the tissues, observed the extent of the killing of that tissue, the—by means of shovels dug out around the trees, examined the roots, and made a rather extensive field examination of the [16] trees.

(Testimony of Kenneth W. Hench.)

Q. While the four of you were there, did you discuss with Mr. Grimm his spray program?

A. Yes.

Q. Do you recall whether or not Mr. Grimm told you what he had last used by way of a spray?

Mr. Barnard: Now, if the Court please, I believe the conversation between the witness would be hearsay.

The Court: I think it would be hearsay. I will sustain the objection.

Mr. Hamilton: Very well, your Honor.

Q. Was that spray program generally discussed by Mr. Rizzi, Dr. Harris, Mr. Hesse, yourself and Mr. Grimm? A. Yes, sir.

Q. Was the condition of the orchard generally discussed by the five of you? A. Yes.

Q. Did you at that time, Mr. Hench, form any opinion as to the cause of this condition of the orchard?

A. Yes, my opinion was——

The Court: I think you can answer that just yes or not, whether you formed an opinion.

The Witness: Yes, sir.

Q. (By Mr. Hamilton): Now, was that opinion based upon virtually, based [17] upon what you yourself observed? A. Yes.

Q. Was it based partially on what you had observed on your prior visit of April 14th?

A. Yes.

Q. Was it based upon the discussion that you heard between Mr. Rizzi, Dr. Harris, Dr. Hesse

(Testimony of Kenneth W. Hench.)

and yourself and Mr. Grimm? A. Yes.

Q. And what was that opinion?

Mr. Barnard: If the Court please, I believe that the opinion of the witness is not proper when it is based upon discussions with other people, and I object on that ground, that is, discussions other than determining the facts.

Mr. Hamilton: Your Honor, it is my opinion that a person becomes an expert by what he reads, that is written by others, what he personally observes, and in conversations with other experts in the same identical field.

The Court: Well, it seems to me, Mr. Hamilton, —I don't know whether this was a tentative opinion, but it seems to me what we are interested in here is the final opinion this witness may have arrived at, and I don't think it is helpful to get the stage views, that is the tentative, if I might use that expression, opinions formed at various stages. I think we are primarily interested in his final opinion, [18] and of course that should come after he has completed all of his examination, investigation, research and other things that he may have resorted to. I am going to sustain the objection to that question.

Mr. Hamilton: Very well, your Honor.

The Court: I think at this time, Mr. Hamilton, we will take our noon recess.

Members of the jury, I want you to keep in mind the admonition I have given you. Don't talk about the case or the witnesses or anything relating to

(Testimony of Kenneth W. Hench.)

the case among yourselves, don't permit any other person to communicate with you on any subject matter of this case and do not form or express any opinion on the merits of the case until that is finally submitted to you for verdict.

We will take our noon recess and we will reconvene at 1:30.

(Thereupon at 12:00 o'clock noon a recess was taken until 1:30 p.m. of the same day.)

Afternoon Session—1:30 p.m.

The Court: Do counsel stipulate the presence of the jury?

Mr. Hamilton: So stipulated, your Honor.

Mr. Barnard: So stipulated, your Honor.

KENNETH W. HENCH

a witness for plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Q. (By Mr. Hamilton): Mr. Hench, be sure that you keep your voice raised so that the jurors can hear what you say, and so that the court reporter can get it down. After you, Dr. Hesse, Dr. Harris, Mr. Rizzi had completed your examination of the Grimm orchard on April 25th, Mr. Hench, did you do anything further in an effort to ascertain the cause of the condition of the Grimm orchard?

A. No, sir, I did not.

Q. Mr. Hench, either at or about the 14th of

(Testimony of Kenneth W. Hench.)

April, 1957, when you made your first examination of the Grimm orchard, after some difficulty had developed, or at or about the 25th of April, 1957, after the examination you conducted with Mr. Rizzi, Dr. Harris and Dr. Hesse, did you visit other Merrill Gem peach orchards in the immediate vicinity of the Grimm orchard? [20] A. Yes, sir.

Q. Did you visit the John Kovacevich Merrill Gem orchard at or about that time?

A. I visited his orchard, and Mr. Moody's.

Q. How far is it from the Grimm Merrill Gem orchard to the Kovacevich Merrill Gem orchard?

A. Not more than a half a mile, I expect.

Q. How far is it from the Grimm orchard to the Moody Merrill Gem orchard?

A. Oh, approximately two miles.

Q. In either the Kovacevich or the Moody Merrill Gem orchards did you see any conditions similar to those you observed in the Grimm orchard? A. No, I did not.

Q. Did the trees in the Moody and Kovacevich orchards appear to be healthy? A. Yes, sir.

Q. No evidence of any disease of any kind?

A. That is correct.

Q. Mr. Hench, in the things you observed in your two examinations of the Grimm orchard, those examinations which you conducted primarily for the purpose of ascertaining what the cause of the condition of the orchard was, did you notice any pattern or symptom or characteristic that indicated

(Testimony of Kenneth W. Hench.)

to you the possibility that one of the elements in the spray [21] had caused the damage?

A. Well, I noticed that the damage, as I indicated before, was confined primarily to the more direct exposure to the sun, in other words, the south side of the trees, or southwest side of the trees. I noticed that the injury was also confined to older wood; in other words, the one year old wood was free of any tissue damage, whereas your crown or your root system were free any apparent damage. I would say those two things were the most outstanding in my mind.

Q. And what did those two characteristics indicate to you?

A. Well, it indicated to me that it was some external mechanical spray that did this injury. That was an opinion of mine.

Q. Is the injury predominantly on the southern or warm side of the tree a characteristic of oil injury?

A. That is right.

Q. I didn't hear your answer?

A. That is correct.

Q. Is an injury or darkening of the cambium predominantly in old wood, wood two years old and older, as opposed to young wood, one year old and less, characteristic of oil injury?

A. Yes.

Q. Mr. Hench, did you ultimately form an opinion as to the cause of the condition of the Grimm Merrill Gem peach [22] orchard?

A. Yes, I did.

Q. What was that opinion?

(Testimony of Kenneth W. Hench.)

A. My opinion was it was spray injury.

Q. Any part of the spray?

A. Well, I was thinking more in terms of oil injury, but I reiterate spray injury.

Mr. Hamilton: You may cross examine.

Cross Examination

Q. (By Mr. Barnard): Mr. Hench, it is true, is it not, that the bark of a peach tree, or of any tree, is in the nature of a protection to the working parts of the tree which are underneath?

A. That is true to a certain extent. It is also a sponge to a certain extent.

Q. And it is true, isn't it, that the older the limb or the trunk becomes the thicker the bark becomes in that area? A. That is true.

Q. Now, what is it in an oil spray that would cause damage to a tree?

A. Well, you actually have a burning effect on the tissues when you have exposure to high temperatures or sun light. Usually when we recommend an oil spray, why, climatic conditions have to be such so that does not occur.

Q. And the burning effect is to the tissues under the bark? [23] A. Yes.

Q. So that the thicker the bark the more protection to those tissues and the less should be the effect, isn't that true?

A. Not necessarily. As your bark develops it also develops lenticels which are breathing pores in the wood or through the bark. In one year old wood

(Testimony of Kenneth W. Hench.)

you have more or less a protective coating by waxes which is—and which is also a smooth surface which would be more apt to shed and not hold the concentration of oil.

Q. Very well. Have you observed in your experience, Mr. Hench, cases of oil burn?

A. Not to this extent, no, I have not.

Q. Have you observed it to any extent?

A. No, I have not.

Q. So that your opinion that this was an oil burn because of the symptoms that were present is not based on anything that you in your experience have seen?

A. It is not based on personal experience, no.

Q. Now, you went out to Mr. Grimm's orchard first on February 28th, is that correct?

A. February 27th.

Q. February 27th. What was the purpose of that visit?

A. That was a farm call in the area.

Q. In other words, it is a part of your job in the Farm [24] Adviser's office to just call generally around the area upon various farmers from time to time?

A. That is correct.

Q. And this visit on February 27th was such a visit, was it?

A. That is correct.

Q. Mr. Grimm hadn't called you, or you hadn't called him?

A. Not to my knowledge.

Q. And at that time did you observe the condition of his peach orchard?

A. I did. I drove by the orchard; I did not

(Testimony of Kenneth W. Hench.)

walk through it, however. I looked it over from the adjacent road of the orchard.

Q. Did you examine the orchard from the standpoint of looking for diseases or insects or organisms that might be present?

A. No, sir, I did not.

Q. So that your testimony that you saw no disease in the Grimm orchard is merely that in your casual examination you didn't see it?

A. That is correct.

Q. You weren't looking for anything at that time? A. Not particularly.

Q. Did you discuss with Mr. Grimm any part of his farm program at that time, on that visit?

A. I do not recall exactly what the visit was composed of at that time.

Q. Did you see on Mr. Grimm's premises any containers or a supply of agricultural chemicals which was to be later applied to the orchard?

A. No, I did not.

Q. Did Mr. Grimm tell you that he had on hand the ingredients of a spray formula which he was going to apply? A. No, he didn't.

Q. In other words, you didn't discuss that with him at all at that time? A. No.

Q. Now, on April 14th, that is your next visit?

A. That is right.

Q. Do I understand that is the visit is the first time that you knew that anything was wrong?

A. That is correct.

(Testimony of Kenneth W. Hench.)

Q. Did you examine the Gold Dust peach trees at that time?

A. Not intimately, no, I did not examine them intimately.

Q. Did you examine the Blazing Gold trees on April 14th?

A. Not closely. I noticed no apparent injury to them, so I did not.

Q. You did know that they had been sprayed with the same substance, did you? [26]

A. That is correct.

Q. And you looked at those two orchards, or those two portions of the orchard, sufficient to see that they exhibited none of the same signs?

A. That is correct.

Q. Now, in the Merrill Gem portion of the orchard, exactly what did you see?

A. Well, I noticed that the leaves were wilted on the damaged side of the trees, the fruit that had set had adhered to the tree, they were not growing. I noticed that the tissue in the damaged trees was dead or dying. I noticed there was quite a variation in the pattern; however, the apparent damage in the trees was confined primarily to the south and southwest exposures of the trees.

Q. You did notice the fact that on the trunks on some of the major limbs there were dark spots?

A. Well, that was a matter of degree of injury. Some limbs were entirely damaged clear around, in other words, a complete girdling. Some limbs had a partial girdling, the north side of the branch

(Testimony of Kenneth W. Hench.)

would be still healthy and the south side would be damaged.

Q. You did see that?

A. I did see that, yes.

Q. And when you cut into the bark and into the cambium layer of some of these damaged limbs, was there a sour odor [27] present?

A. No, there was not.

Q. There was not. Was there coming from the dark portion of the limbs any oozing of gum or juice?

A. There was not any unusual pattern like that at all.

Q. You didn't see anything like that?

A. No.

Q. Had you seen an oozing of gum and had there been present a sour odor, would that cause you to think any differently about the cause of this disease?

A. Yes, it could have, if the pattern was uniform around the trees.

Q. I believe you stated that the pattern was arranged all the way from very little on one limb to all the way around on other limbs?

A. That is correct.

Q. And that, of course, is true also of various diseases that trees are subject to, that in some trees it will be more severe than in others?

A. Well, I don't think you will find on a disease one side of the tree mainly affected and the other side not affected.

(Testimony of Kenneth W. Hench.)

Q. But you will find a variation in the severity— A. That is true.

Q. —in different parts of the orchard? [28]

A. That is true.

Q. And also in different parts of the same tree? A. That is right.

Q. Now, Mr. Hench, are you familiar with a disease known as bacterial canker? A. Yes.

Q. Is that a disease which affects stone fruit trees in the San Joaquin Valley? A. Yes.

Q. And of course a peach tree is a stone fruit tree? A. That is correct.

Q. It is true, is it not, that one of the symptoms of bacterial canker is a darkness of the cambium layer? A. That is correct.

Q. And it is true also that one of the symptoms of that disease is a sour odor exuding from the cambium layer when a part is cut?

A. That is one of the symptoms.

Q. Of course; I don't mean in any of these questions to imply that any one of them is the total. And it is true also, is it not, that quite frequently the disease of bacterial canker attacks the south or the sunny side of the trees worse than the north side? A. I can't answer that, sir.

Q. In other words, you just don't know? [29]

A. It is my opinion that it can attack any side of the tree.

Q. Do you know whether it is frequently worse on the south? A. No, I do not.

Q. You don't know. Now, Mr. Hench, what in

(Testimony of Kenneth W. Hench.)

your opinion would be the reason that a substantial portion of the Merrill Gem orchard should be affected by an oil spray while none of the Blazing Gold or Gold Dust trees would be so affected, when they had all been sprayed at the same time?

A. There are degrees of sensitivity between various varieties to sprays; that is well established.

Q. That is what?

A. That is well established, that there are degrees of sensitivity.

Q. And would it be true that also the age of the tree might have something to do with it?

A. Possibly.

Q. And if the tree is older it wouldn't be as vitally affected as if it was younger?

A. To what specific problem? To oil?

Q. To oil injury? A. Oil injury?

Q. Yes.

A. I couldn't elaborate on that. [30]

Q. So I take it then that you don't know whether the age of the tree would have anything to do with that? A. That is correct.

Q. Now, referring once again to the disease of bacterial canker, Mr. Hench, does bacterial canker affect the root system of trees?

A. It is primarily above ground portions of the trees.

The Court: I don't know that is an answer to the question.

The Witness: I would say no, not to my knowledge.

(Testimony of Kenneth W. Hench.)

Q. (By Mr. Barnard): To your knowledge it does not affect the root system? Is that correct?

A. That is correct.

Q. And does bacterial canker affect the crown?

A. To my knowledge I believe it can.

Q. It can? A. Yes.

Q. Have you had any experience in examining a tree suffering from bacterial canker in which the crown was affected? A. No.

Q. So that in examining the trees in Mr. Grimm's orchard, the fact that you found no damage or injury to the root system would be just as consistent to the presence of a disease such as bacterial canker as it would to an oil injury?

A. That is true. [31]

Q. Now, this bacterial canker that we have been discussing, is that a well defined disease as it now exists in California?

A. To my knowledge it can be readily isolated.

Q. It can be readily isolated? A. Yes.

Q. And is it prevalent in California?

A. Prevalent in areas north of Kern County is my understanding.

Q. Prevalent in stone fruit trees? A. Yes.

Q. And it has been so prevalent for the last several years, has it not?

A. I believe so. I don't profess to be an authority on plant diseases. That is one reason why I sent the material in for the experts to examine the tissue.

(Testimony of Kenneth W. Hench.)

Q. You haven't had any particular training in diseases?

A. I have had courses in plant pathology, but I am not a specialist in that field.

Q. And are you a specialist in oil injuries?

A. No, I am not.

Q. Do you know, Mr. Hench, if you sprayed a tree with enough oil to kill it, would the damage occur all at once and almost immediately after the spraying, or would the tree continue to grow for a month or six weeks and then show [32] the injury?

A. Depends upon how much you put on, when you put it on, there would be several factors involved.

Q. And if you sprayed enough oil to affect the older limbs and the trunks where the bark was the thickest, what would be the effect on the new growth?

A. That depends upon the degree of girdling. If you completely girdled the tree, why, you would be apt not to have any growth from that limb. If there were a partial girdling you would have new growth from that portion of the limb which was undamaged, or from the lower portion.

Q. And by girdling, would you explain what you mean?

A. That is complete killing of your cambium around the branch or limb.

Q. In other words, if you killed it all the way around?

A. That is correct.

(Testimony of Kenneth W. Hench.)

Q. And having girdled the limb with the oil spray you would not have a development of fruit thereafter, is that correct? A. That is correct.

Q. And you would not have a development of leaves? A. That is correct.

Q. Now, on your direct examination you stated as one of the reasons which caused you to lean toward an oil injury was the fact that there was a difference in the pattern, or [33] the pattern indicated—I beg your pardon. Your statement was that the pattern indicated no pathogenic disease, and therefore by inference, in other words, that the pattern did indicate an oil injury. Will you explain what type of pattern you are talking about?

A. Well, I don't know of any disease offhand that would confine itself to one exposure of a tree. That is essentially what I had in mind. My mind was not set that this was oil injury by any means, when I first saw the orchard. That is the reason I thoroughly explored other possibilities. My mind was not set, this was merely an opinion.

Q. In the oil injury cases that you know of, is there usually a pattern present?

A. In the ones I have been told about there is a pattern such as we had out there, that is correct.

Q. And what is that pattern?

A. Well, a tendency toward more damage on the exposed portions of the tree and also on the older wood.

Q. All right. Now, at the time that you took the samples of wood which you later forwarded to

(Testimony of Kenneth W. Hench.)

Davis, do I take it by that that you actually cut off some of the dead limbs?

A. That is correct.

Q. And how large were the limbs that you cut?

A. Well, they were all degrees, some of them were fairly large. [34]

Q. And can you give us an estimate of the diameter?

A. Oh, two inches.

Q. Would that be the largest?

A. That would be, yes.

Q. And then you said they varied, so I assume that you also cut some that were smaller?

A. That is correct.

Q. Were the ones that you cut all completely dead?

A. Well, they looked to me like they were completely girdled, yes. I will say that.

Q. I take it then that they had no leaves on them?

A. Well, there could be some leaves holding to the damaged twig. I don't recall exactly whether the leaves were there.

Q. Do you recall whether there were any green leaves?

A. No, there were no green leaves.

Q. In other words, such leaves as there were would be dried up too, wouldn't they?

A. That is right.

Q. Some of which might not have fallen. Was there any fruit on any of these limbs?

A. Not to my knowledge.

(Testimony of Kenneth W. Hench.)

Q. Now, then, on April 25th, at the time you and a number of other gentlemen from Davis examined the orchard, you stated that you again cut into the branches? [35]

A. That is correct.

Q. And did you at that time observe any sour odor?

A. No odor that was particularly unusual, no.

Q. And were the cambium layers under those portions that you cut a dark color? A. Yes.

Q. And did you at that time observe the oozing of any gum or juice?

A. Not to any significant degree, no.

Q. Now, during the year 1957 you testified that you visited the other Merrill Gem orchards in Kern County, that is two others at least, and found nothing wrong. Did you at any time visit any peach orchards in Kern County that were suffering from any disease or diseases anywhere near in the nature of bacterial canker? A. No.

Q. Did you visit any in any other parts of the state? A. No.

Q. And in 1958, so far this year, have you visited any orchard suffering from bacterial canker?

A. No, I have not.

Q. And had you in 1956, then?

A. In 1956 I was not in this—well, I came here in 1956, February 1956. I did not, no.

Q. You did not. So that once again your knowledge [36] of the symptoms displayed by bacterial canker in the San Joaquin Valley on stone fruit

(Testimony of Kenneth W. Hench.)

trees is a knowledge which you have learned from your studies and not from personal experience?

A. That is correct.

Q. Now, it is true, isn't it, Mr. Hench, that there are other diseases somewhat in the nature of bacterial canker which are among the experts known by different names? A. Yes.

Q. In other words, to paraphrase it for us laymen, there are many diseases suffered by trees the same as there are diseases suffered by people which only an expert can really tie down?

A. That is correct.

Q. And there are also diseases which even an expert has difficulty in distinguishing one from the other?

A. Well, most of the diseases recognized in California can be isolated by the experts. I would rather have the plant pathologist answer that question.

Q. Now, Mr. Hench, you testified that you forwarded these limbs, branches, or whatever they were, to Davis? A. That is correct.

Q. And that you received a reply from Mr. Wilson? A. Yes.

Q. Do you have that report with you?

A. I do not. [37]

Mr. Barnard: Counsel, do you have the original?

Mr. Hamilton: The original is with Mr. Grimm's deposition.

Mr. Barnard: Is this a copy?

Mr. Hamilton: Yes.

(Testimony of Kenneth W. Hench.)

Mr. Barnard: If the Court please, I have in my hands a document which was identified as Defendant's Exhibit D in the deposition of Mr. Charles Grimm, which is a copy of the letter to which I have just referred, and I don't believe the original is available. I am satisfied with a copy if Mr. Hamilton is.

Mr. Hamilton: I am satisfied with the copy.

Mr. Barnard: May I show it to the witness?

The Court: Let's mark it Defendant's Exhibit A for identification.

(The document referred to was marked as Defendant's Exhibit A for identification.)

Q. (By Mr. Barnard): Mr. Hench, I hand you Defendant's Exhibit A for identification, and for the purpose of the record may I also identify it as being a document which is referred to in the deposition of Charles Grimm as Defendant's Exhibit D, and will you read that, Mr. Hench?

A. "Mr. Kenneth W. Hench"—

Q. No, read it to yourself.

A. Oh, I have. [38]

Q. Is that the report to which you referred as having been received from Mr. Wilson?

A. That is the report, right.

Mr. Barnard: Then I offer it, if the Court please, as Defendant's Exhibit A.

Mr. Hamilton: No objection.

The Court: It will be received and marked Defendant's Exhibit A. Do you care to read it to the jury?

(Testimony of Kenneth W. Hench.)

(The document heretofore marked as Defendant's Exhibit A for identification was received in evidence.)

Mr. Barnard: Defendant's Exhibit A is on the letterhead of the Cooperative Extension Work in Agriculture and Home Economics, State of California. With the Court's permission I will omit the balance of the letterhead, merely having reference to the telephone number, address, etc.

"April 16, 1957. Mr. Kenneth W. Hench, Farm Adviser, Post Office Box 791, Bakersfield, California. Dear Mr. Hench:

"Louis Probesting brought me the peach branches (Merrill Gem). There doesn't seem to be any infectious disease involved in this situation. The manner in which the trouble shows up only on the south side suggests an injury from an outside source. The damage is not typical of oil injury which should be worse in the tips of the leaves.

"Yours sincerely, E. E. Wilson, Plant Pathologist."

I have no further questions, Mr. Hench. [39]

Redirect Examination

Q. (By Mr. Hamilton): In counsel's examination, Mr. Hench, you and he referred to the crown of the tree. What portion or part of the tree did you refer to in your use of the term crown?

A. Well, that is the base of the tree, sir.

Q. Is that underneath the surface of the ground, or above the surface of the ground?

(Testimony of Kenneth W. Hench.)

A. Well, it is usually referred to as the area right at the ground.

Q. At the ground line. It is not the area below the ground where the roots join, or does it include the area of the trunk where the roots have joined?

A. It is that area where the trunk and roots join, but particularly at the ground level.

Mr. Hamilton: No further questions.

The Court: That is all, Mr. Hench.

Mr. Hamilton: May this witness be excused?

The Court: Do you have any further need of him?

Mr. Barnard: No, your Honor.

The Court: Mr. Hench, you are excused from further attendance, as far as the Court is concerned. Next witness?

(Witness excused.)

Mr. Hamilton: I will call John Kovacevich. [40]

JOHN KOVACEVICH

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: John Kovacevich.

The Clerk: Have that seat.

Direct Examination

Mr. Hamilton: Your Honor, in the ordinary course of events, I would have preferred to have presented all of the evidence concerning the cause of the injury prior to getting into the damage fea-

(Testimony of John Kovacevich.)

ture. However, Mr. Kovacevich is leaving the area tonight on a trip with a number of other persons, and informed me that if possible he should like to go on today. Therefore, in the matter of ordinary progression his testimony will be somewhat out of order.

Mr. Barnard: I have no objection.

The Court: All right.

Q. (By Mr. Hamilton): Your name is John Kovacevich? Is that correct? A. Yes.

Q. Where do you reside, Mr. Kovacevich?

A. 280 El Cerrito Drive, Bakersfield.

The Court: Mr. Kovacevich, you have to keep your voice up so the jurors can hear you. [41]

Q. (By Mr. Hamilton): Be sure and keep your voice up, sir, so that everyone can hear you. What is your business or occupation?

A. I am grower and shipper of fruits and vegetables.

Q. How long have you been engaged in that business? A. In excess of 30 years.

Q. Have you been engaged in that business in Kern County for 30 years?

A. Been in Kern County since 1928.

Q. Mr. Kovacevich, how much land do you own or have under your control in vineyards and orchards?

A. Oh, about 900 acres in Kern County.

Q. How much land elsewhere?

A. I farm around 240 acres in Riverside County.

(Testimony of John Kovacevich.)

Q. Is that also in orchards and vineyards?

A. Citrus and grapes.

Q. Are your operations in any other area?

A. That is all at the present time.

Q. In other words, a total of around 1150 acres, is that correct?

A. That is in vineyards and orchards. I farm some cotton also.

Q. The land that you operate in Kern County, in what particular area of that county is it located?

A. The Arvin, Wheeler Ridge area. [42]

Q. Any other areas?

A. In Kern County?

Q. Yes. A. No, that is about it.

Q. And the two places Riverside County, and the Arvin area of Kern County?

A. That is right.

Q. During those 30 years of vineyard and orchard operation, Mr. Kovacevich, have you yourself purchased and sold properties, lands in orchards and vineyards? A. I have.

Q. Have you heard of other sales over that period of time? A. Oh, I have, certainly.

Q. You yourself have planted peach orchards, have you not, starting with the seedlings and developing them to full maturity?

A. I started with plants that have been budded; not necessarily seedlings. Yes, I have planted several.

Q. How many acres of peaches?

A. Well, with this year's planting with peaches

(Testimony of John Kovacevich.)

and nectarines, slightly under 400 acres. That is growing at the present time, is that what you mean?

Q. That is correct. A. That is right.

Q. Your land in the Arvin area is immediately adjacent [43] to the land of Charles W. Grimm?

A. Well, we consider that the Wheeler Ridge area, that is what we would call it. I have a piece of property there, 240 acres across from Mr. Grimm.

Q. In other words, just across the fence line?

A. Imaginary line; actually it is a section line is all it is, quarter section line.

Q. You are familiar with Mr. Grimm's Merrill Gem peach orchard, are you? A. I am.

Q. Have you been in it many times?

A. Many times.

Q. Mr. Kovacevich, do you have an opinion of the fair market value of Mr. Grimm's Merrill Gem peach orchard, that is, value per acre, as that orchard existed on March 4th of 1957?

A. Yes, I have.

Q. What in your opinion was the fair market value of that land and the orchard?

A. Well, I would say about \$2,200 per acre.

Q. Mr. Kovacevich, since March 4th of 1957 have you been in Mr. Grimm's Merrill Gem peach orchard? A. I have.

Q. According to your best recollection, after March 6th of 1957 when was the first time you were in that orchard? [44]

(Testimony of John Kovacevich.)

A. Oh, I don't recall the exact time. I remember going into the orchard slightly before thinning time, which would be along the last part of April, I imagine. That is about the time.

Q. You are aware of the condition of the orchard? A. Very well.

Q. Mr. Kovacevich, do you have an opinion of the fair market value of that orchard now?

A. I have an opinion, yes.

Q. And what is that opinion?

A. I would say about \$1,500.

Q. Per acre? A. That's right.

Q. And I take it according to your opinion there has been a drop in the value of that peach orchard of \$700 per acre? A. I would say so.

Q. Mr. Kovacevich, have you on your lands immediately adjacent to the Grimm lands, have you had any experience with frost damage?

A. Frost?

Q. Yes. A. No, I have not.

Q. How long have you owned that particular piece of land?

A. I acquired it in 1946.

Q. In your operations in the Arvin area, have you had [45] any experience with frost damage?

A. To some slight degree in the spring.

Q. When?

A. Oh, it has been many years, I don't recall the exact year. We have had frost, some small degree of damage, I would say four or five times in some 30 years, never serious.

(Testimony of John Kovacevich.)

Q. It never was serious?

A. No. That is, we are speaking of tree fruit?

Q. Yes. A. Yes.

Q. What sort of tree fruits do you have in the Arvin area? A. Plums and peaches.

Q. And the tree fruit right next to Grimm's ranch? A. Peaches and nectarines.

Q. Mr. Kovacevich, have you ever used an agricultural chemical sold under the trade name of Mitox as a spray on peaches, or any other kind of tree fruit? A. Not to my knowledge.

Q. Mr. Kovacevich, do you use oil as a spray on your peaches?

A. We used a little oil this year. Last year we did not.

Q. Prior to this year have you used oil as a spray?

A. No, not to my knowledge. Again it is possible one of my men might have at times, but not to my knowledge.

Q. What percentage of oil did you use this past year? [46]

A. The only oil we used this past year was a dormant spray known as Fostex; I understand there is some oil in it. It is a different type of a spray than Mitox, I understand, and is supposed to be milder.

Q. You say the oil was in the chemical you used? A. Fostex was in oil.

Q. In oil. Do you remember the spray formula?

A. No, I do not. It was supplied by, as I

(Testimony of John Kovacevich.)

understand it is somewhat new, and we looked around for something that we wouldn't be afraid to use, and as a result we tried Fostex, but I can't tell you the definite results as yet.

Q. Have you ever used oil in the pink bud stage? A. No, I have not.

Q. According to your experience and your knowledge as a grower of tree fruits for 30 years, what is your attitude toward the use of oil as a spray after the trees have broken dormancy?

Mr. Barnard: If your Honor please, I am going to object to that question.

The Court: I will sustain the objection to the question.

Q. (By Mr. Hamilton): Mr. Kovacevich, do you have an opinion as to whether or not the use of oil as a spray material after trees have broken dormancy is or is not dangerous?

The Court: Well, I doubt, Mr. Hamilton, if I can permit [47] the witness to answer the question. I don't think there is sufficient foundation laid for this witness or his experience in the use of any oil, or any spray containing oil, to permit him to answer.

Mr. Hamilton: Very well, your Honor.

Q. Mr. Kovacevich, if I remember correctly your earlier testimony you were in the Grimm orchard after it was sprayed on March 5th and 6th, 1957, and are familiar with its condition and appearances? A. Yes, I am.

Q. Have you ever in your experience, Mr. Kova-

(Testimony of John Kovacevich.)

cevich, seen an orchard that showed generally the same symptoms or appearance as the Grimm orchard showed? A. I have not.

Q. Your own Merrill Gem peach orchard, Mr. Kovacevich, in the spring of 1957 did it show any evidence of any bacterial disease of any kind?

A. Not to my knowledge. It looked very healthy.
Mr. Hamilton: You may cross examine.

Cross Examination

Q. (By Mr. Barnard): Mr. Kovacevich, have you ever seen a peach orchard that was suffering from any disease at all?

A. I sure have. Had them.

Q. And when that happened did every orchard in the [48] vicinity suffer from the same disease?

A. No.

Q. Do you know that there has been a large incidence of disease in peaches in the San Joaquin Valley in the last several years?

A. No, I can't say that I have. I am farming in the southern end.

Q. You have confined yourself pretty well to the Kern County end, is that correct?

A. That is right.

Q. And you haven't been up around Tulare County and Fresno County and Merced County looking at other orchards? A. I have not.

Q. All right. Now, as far as your values are concerned, Mr. Kovacevich, have you seen Mr. Grimm's orchard recently? A. I have.

(Testimony of John Kovacevich.)

Q. And is the opinion which you expressed as to its value after the disease, injury, or damage, an opinion based on what you have seen just recently?

A. My—you want me to answer that, explain my reasoning?

Q. Yes.

A. My opinion is based on the condition of the orchard last year at the time right after injury, and watching it practically through the summer. That is what it is based on. The tree in dormant stage, there isn't too much you can base [49] your opinion on.

Q. Are you assuming then that the trees this year, as they leaf out and put on fruit, and so forth, will be in the same condition as they were last spring when you saw them?

A. Well, my opinion is there will be a slight improvement in their condition.

Q. And your opinion of the value has allowed, has it, for that improvement? A. Yes.

Mr. Barnard: That is all.

The Court: That is all, Mr. Kovacevich.

Mr. Hamilton: May this witness be excused.

Mr. Barnard: Certainly he may be.

The Court: You may be excused. The next witness?

(Witness excused.) [50]

Tuesday, April 8, 1958. 2:15 P.M.

Mr. Hamilton: We will call Dr. E. E. Wilson.

DR. EDWARD E. WILSON

called as a witness by the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Edward E. Wilson.

Direct Examination

Q. (By Mr. Hamilton): Where do you reside, Dr. Wilson?

A. 62 College Park, Davis, California.

Q. Your business or occupation?

A. I am professor of plant pathology at the experiment station at the University of California at Davis.

Q. Sir, where did you take your initial education?

A. I took two years at the University of Kentucky, went to the University of Wisconsin where I completed five more years work.

Q. When you finished your schooling did you obtain any degrees? A. I obtained——

Mr. Barnard: If the Court please, and Mr. Hamilton, I am willing to stipulate to Dr. Wilson's qualifications. [51]

Mr. Hamilton: Qualifications as an expert.

The Court: Members of the jury, counsel have stipulated to the qualifications of Dr. Wilson, as an expert in the field of plant pathology, or what would you call it?

The Witness: Plant pathology, diseases of plants.

(Testimony of Dr. Edward E. Wilson.)

The Court: Diseases of plants. Very well.

Q. (By Mr. Hamilton): Now, as a pathologist, plant pathologist, sir, your specialty is in connection with diseases of plants?

A. Diseases of fruit trees and nut trees is my specialty.

Q. Tree fruit, that is your specialty. Is that to the exclusion of injury that might be caused mechanically, or from a source other than a bacteria, or a virus or a fungus?

A. Not exactly. Incidentally, we receive numerous specimens during the period of a year and examine them, and in many cases some of those may be mechanical or other than infectious diseases.

The Court: Doctor, would you mind keeping your voice up a little. It is difficult for the jurors and all of us to hear.

The Witness: Incidentally at times we come in contact with injuries which are caused by other than infectious diseases but we—that is more or less incidental to our study of plant diseases. We are asked to examine specimens which may or may not turn out to be disease. [52]

Q. (By Mr. Hamilton): But the specimens that you might examine that were injured mechanically, or from some outside source, and I mean by outside source something other than within the tree or soil itself, would be only incidental to your specialty of examination for disease, infectious disease? A. Yes.

(Testimony of Dr. Edward E. Wilson.)

Q. Is that correct?

A. I think, as I understand your question, we do consider the bacterial disease from an outside source, that is coming from the outside and entering the plant and causing the disease.

Q. Dr. Wilson, you never have been personally to the Charles Grimm ranch—— A. No.

Q. ——south of Bakersfield? A. No.

Q. But you did in the course of your work at Davis receive some plant material from a gentleman by the name of Louis Proebsting?

A. That is correct.

Q. And I assume from your report which has been read into evidence that this material which Mr. Proebsting delivered to you was identified as material from Merrill Gem peach trees—— [53]

A. Merrill Gem.

Q. ——from the Charles Grimm ranch?

A. No, I have no record of—nor remembrance of any source of this material. That is, I went back over records.

Q. Have you——

The Court: Just a minute. You complete your statement, Doctor, you have completed?

The Witness: Yes.

Mr. Hamilton: I am sorry, I didn't mean to interrupt.

The Court: I didn't know whether you had completed your answer. In other words, do you know from your own knowledge or from any rec-

(Testimony of Dr. Edward E. Wilson.)

ords the source of the material which you examined?

The Witness: No, I do not.

The Court: Do you know who delivered it to you?

The Witness: Dr. Proebsting, of the plant department.

The Court: Do you know about when he delivered it to you?

The Witness: I have no remembrance of it, except it must have been a day or so earlier, before my letter, which I think was dated April 16, 1957.

The Court: All right.

Q. (By Mr. Hamilton): You were informed by Dr. Proebsting that this material had been delivered to him by Kenneth Hench? A. Yes. [54]

Q. And you were advised to address your report to Mr. Hench? A. Yes.

Q. Now, what sort of an examination of that material did you conduct, Dr. Wilson?

A. I don't recall. We received numerous specimens during the year. Usually we make a visual examination, very much like a doctor would of a patient, examine for symptoms, and then usually I make a microscopic examination——

Mr. Barnard: If the Court please, I think that the witness should confine himself to testifying as to what he did in this particular case.

The Court: I think, Doctor, it isn't what you usually do. To the best of your ability and recollection what did you do in this particular case?

(Testimony of Dr. Edward E. Wilson.)

The Witness: I have no recollection of the incident regarding this specimen.

Q. (By Mr. Hamilton): At the time, sir, that your letter was addressed to Mr. Hench, what you had done by way of examination was fresh in your mind, is that correct? A. At the time.

Q. At that time, on April 16th, when you addressed this letter to Mr. Hench? A. Yes. [55]

Q. The original of this particular letter appears not to have been in the possession of any person involved in this action. What we have here is a copy. Would you look at that letter and identify it, as to whether or not that is the letter which you addressed to Mr. Hench?

A. I have a photostat of a carbon copy of this letter here if I could compare it. It appears to be the same wording. I would say that was the content of the letter.

Q. That is the letter. Thank you. In that letter, sir, you state "There doesn't seem to be any infectious disease involved in this situation." What did you mean by the use of the word "infectious"?

A. Caused by bacteria, fungus or a virus.

Q. In other words, your examination to you at least would eliminate the possibility of the presence of bacterial canker, bacterial gummosis——

A. Yes.

Q. ——sour sap—— A. Yes.

Q. ——or any other disease of which you have knowledge caused by a virus or a fungus?

A. Yes, that is correct.

(Testimony of Dr. Edward E. Wilson.)

Mr. Hamilton: You may cross examine. [56]

Cross Examination

Q. (By Mr. Barnard): Dr. Wilson, first of all, what do you mean by infectious disease?

A. A disease produced by an organism, usually microscopic in size, very small in size, bacteria, fungus or virus.

Q. Caused by any one of the three?

A. Any one of the three?

Q. Does it mean that a disease will spread, or does spread from tree to tree, the same as we think of an infectious disease in human beings?

A. Yes.

Q. Now, do you recall the material that was submitted to you in this case at all? A. No.

Q. Do you recall whether it consisted of dead limbs or twigs, or whether or not some were alive?

A. I have no recollection of the material.

Q. You have none whatsoever? A. No.

Q. Tell me, Doctor, if a bacteria, or fungus or virus is present in the limb of a peach tree and the limb dies, and is cut from the tree, will it be possible, or would it be possible in the future to determine whether or not that virus, that fungus, or that bacteria had existed prior to the [57] death of the limb? A. Within a reasonable time.

Q. And for how long a period?

A. Oh, it is hard to say, some bacteria after the death becomes dried out. The bacteria may die

(Testimony of Dr. Edward E. Wilson.)

within a very few days, or the fungus probably survives somewhat longer.

Q. Are you familiar with the disease known as bacterial canker? A. Yes.

Q. And I take it from its name that is a bacteria? A. Bacterial disease, yes.

Q. And how long would a bacteria remain in a state that it could be discovered and recognized in a dead limb?

A. Oh, a week or ten days, if the material were not allowed to dry out.

Q. A week or ten days from the time it was cut from the tree? A. Yes.

Q. Or from the time the limb died?

A. Well, from the time the limb died, I would say.

Q. Now, you stated in your report, Dr. Wilson, there didn't seem to be any infectious disease involved in this situation. You meant by that, I take it, that you didn't find any bacteria, any fungus, any virus, present in these [58] tissues when you examined them?

A. I would say I found no bacteria or fungus involved. The virus would be more difficult, since it cannot be seen by the ordinary microscope. May I have an explanation here? Part of that statement is based on symptoms, of course, as well as microscopic examination.

Q. Based on the symptoms as they were described to you by someone?

(Testimony of Dr. Edward E. Wilson.)

A. Yes, that—symptoms and examination under the microscope.

Q. Now, if you had been told that the trees exhibited a dark—not a dark, but dark spots on the limbs and on the trunks from which the sap was oozing, and that the cambium layer where those spots were cut was dark and had a sour smell, would you have then thought that there didn't seem to be any infectious disease involved?

A. No.

Q. In other words, you would have thought that there was? A. Possibly.

Q. Possibly. In other words, the symptoms which I have described are symptoms which frequently occur when there is the presence of an infectious disease?

A. Of a certain disease, yes.

Q. Are those symptoms symptoms which appear with the presence of bacterial canker? [59]

A. Discoloration of the bark, of the cambium, and exudation of gum, are symptoms of bacterial canker.

Q. And how about sour—

A. Sour odor at times, exudation of gum and sour odor may or may not be present.

Q. And how about the presence of the bacterial canker on the south or the sunny side of the trees, is that something which frequently occurs?

A. Not to my knowledge.

Q. It is not?

A. You want me to elaborate on that?

(Testimony of Dr. Edward E. Wilson.)

Q. Yes, please.

A. In the course of some experiments I determined that bacterial canker could develop more rapidly on the south side, but it was not confined to the south side of the trees, not in relation to this disease.

The Court: I think the Doctor dropped his voice, and I didn't hear. Would you read it, Miss Schulke?

(Answer read.)

The Court: Did that complete your answer, Doctor? If not, you finish.

The Witness: I wish to apologize. This hearing aid makes me lower my voice.

The Court: Yes. Keep it up so we can all hear you. [60]

Q. (By Mr. Barnard): In other words, Doctor, then it is your testimony that bacterial canker would not be confined to the south side of the trees?

A. Yes.

Q. But would, shall we say, thrive more there?

A. Oh, possibly, if the temperature was more favorable.

Q. In other words, the growth of bacterial canker is dependent to a certain extent on temperature, is it? A. Temperature, yes.

Q. And in California in the spring time the temperatures on the south side of the trees are warmer than the temperatures on the north side, due to the fact the sun is farther south?

A. I presume so.

(Testimony of Dr. Edward E. Wilson.)

Q. So that it would be entirely consistent to get a more rapid growth of the bacterial canker on the south side of the trees?

A. That is a possibility.

Q. Now, your specialty is plant pathology. Have you done much work in detecting and examining strata? A. No, very little.

Q. And of course you didn't see Mr. Grimm's orchard? A. No.

Q. Do you recall if you have talked to anyone who [61] described in detail the conditions that existed there? A. No, I have not.

Mr. Barnard: That is all.

Redirect Examination

Q. (By Mr. Hamilton): Dr. Wilson, there is testimony in the record that Mr. Hench gathered the material which was delivered to you by Mr. Proebsting on April 14th of 1957. Your letter bears the date of April 16, 1957. A. Yes.

Q. Now, do you know of any bacterial disease, or fungus disease, the evidence of which would disappear within two days?

Mr. Barnard: Now, if the Court please, I am going to object to that as being argumentative, being cross examination of counsel's own witness.

The Court: I think it is argumentative, Mr. Hamilton. You can certainly inquire of the witness, I think, on redirect as to the length of time that evidence may still be present. I think the witness

(Testimony of Dr. Edward E. Wilson.)

has indicated that already, but you certainly may ask it again.

Q. (By Mr. Hamilton): Between April 14th and April 16th, would the evidence of the presence of an infectious disease remain on that material?

A. If it was properly preserved, yes, not allowed to dry out, yes.

Q. Now, do you recall whether or not the material was in the bags which are designed——

A. I have no recollection of the material whatsoever.

Q. Dr. Wilson, as a plant pathologist, it is possible to raise by culture, or grow the bacteria that produces bacterial canker or gummosis?

A. It is, yes.

Mr. Hamilton: I have no further questions.

Recross Examination

Q. (By Mr. Barnard): I have just one question, Dr. Wilson. In answer to Mr. Hamilton's question, that bacteria would be found on April 16th in a sample submitted on April 14th, I didn't quite hear your answer. I believe you stated that it was alive to begin with.

A. If the bacteria were alive to begin with, if the material was properly preserved, not allowed to dry out.

Q. And if the limb had already been dead for an unknown period of time you might or might not find the evidence of bacteria?

(Testimony of Dr. Edward E. Wilson.)

A. For a length of time, yes, for quite a period of time.

Mr. Barnard: I would like to ask permission of the Court to ask one or two questions that I probably should have asked [63] originally.

The Court: All right.

Q. (By Mr. Barnard): Dr. Wilson, would you explain or tell the jury the symptoms exhibited by a peach tree which is suffering from bacterial canker?

A. That depends on the part attacked. Bacterial canker may attack almost any part of the tree, enter through the blossoms, through the buds, twigs, large branches. The most—the most destructive symptoms are those on the branches, cause a large dead, discolored area of the bark. This bark may or may not be sour smelling, it may or may not exude gum. That is just about the principal symptom.

Q. Are the roots affected?

A. Seldom, if ever.

Q. And the crown?

A. The disease area may extend to the ground level, that is to the crown, but seldom ever below the ground.

Q. And is there any difference between the old and the new wood, as to which might be affected first or the most?

A. No; the old wood may become infected from the fact the bacteria entered a young twig and moved down into the old wood, or the infection may

(Testimony of Dr. Edward E. Wilson.)

occur through wounds or through natural openings.

Q. In other words, the damage appears wherever the [64] infection—— A. Yes.

Q. ——occurs and it can occur any place on the tree? A. Yes.

Q. Now, what is the effect on the leaves and the fruit?

A. Direct infection of the leaves may cause small spots to appear, and brown circular spots. If the branch is killed the leaves of course wither. If the branch is infected itself, the leaves may wither and die.

Q. And would fruit that was on those branches also then wither? A. Wither.

Q. In other words, it would quit growing?

A. I didn't get the last.

Q. In other words, fruit would quit growing and stop at whatever state of development it was at the time of the attack? A. Yes.

Mr. Barnard: That is all.

Mr. Hamilton: I have no further questions.

(Witness excused.)

The Court: We will take our afternoon recess, and during the recess remember the admonition I have given you.

(Short recess) [65]

The Court: The jury is present, gentlemen?

Mr. Barnard: So stipulated, your Honor.

Mr. Hamilton: So stipulated, your Honor. Call Frank Hornkohl.

FRANK HORNKOHL

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Frank Hornkohl.

The Clerk: Have that seat.

Mr. Hamilton: May the record show, your Honor, that this witness is called under, I believe, Section 43-B, or the equivalent to Section 2055 of the State Code, as an employee of Cal-Spray.

Mr. Barnard: If the Court please, I do not agree that he is an employee of Cal-Spray. I will state the fact that Mr. Hornkohl was employed by the defendant to make a certain study of Mr. Grimm's orchard, and he did that on our behalf.

Mr. Hamilton: Then he was employed by Cal-Spray?

Mr. Barnard: He was employed as an independent contractor for that limited purpose. Now, whether that makes him an employee within the Code section, I don't know.

The Court: Just let me find the code section. Would counsel approach the bench?

(The following proceedings were had at [66]

the bench, outside the hearing of the jury:)

The Court: Now, 43-B says "A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party."

(Testimony of Frank Hornkohl.)

Mr. Hamilton: Referring to 43(a), that particular portion which authorized the use of state procedural rules and in any case the State rule which fixes the reception of evidence.

Mr. Barnard: I believe the State rule, as far as 2055—

The Court: I think it is much broader.

Mr. Hamilton: It has been revised.

The Court: The only question in my mind, of course, is under the statement of Mr. Barnard. I think you will have to develop that and then I will rule on it.

Mr. Hamilton: I did not expect Mr. Barnard to admit the employment. I think from the testimony of the witness I can show he was employed for this purpose.

Mr. Barnard: There is no question about that, but as an independent contractor.

Mr. Hamilton: 2055 as revised, I believe in September of this past year, now includes employees.

The Court: Yes, I realize that, but what is in my mind [67] now is that after the events have taken place a party employs somebody to make an investigation of those events, whether that is the type of employee the statute contemplates, or whether it doesn't contemplate a person who was employed during the period during which these events occurred.

Mr. Hamilton: I think I can establish that Mr.

(Testimony of Frank Hornkohl.)

Hornkohl placed himself still in the employ and still in the confidential relationship with Cal-Spray.

Mr. Barnard: That would not be material.

Mr. Hamilton: At all times.

The Court: Was he an employee of Cal-Spray, we will say, in March of 1957?

Mr. Barnard: No.

Mr. Hamilton: No, he was as I understand it, and I have very limited information, employed by Cal-Spray to make a survey of the orchard to ascertain the extent and nature of the damage, the cause of the damage, and advise Cal-Spray concerning those matters. He is a chemist who, as I understand it, analyzed the chemical reactions.

Mr. Barnard: That was in August of 1957, and that has been his only employment.

Mr. Hamilton: That is directed toward the things at issue here, what caused the damage, and the nature and extent of it.

The Court: What is the case on this? [68]

Mr. Hamilton: I do not have one.

Mr. Barnard: I didn't look because I didn't expect Mr. Hamilton to call him.

Mr. Hamilton: Well, Mr. Hamilton called him because Cal-Spray had employed him for that purpose.

The Court: I am inclined to feels that a person would have to be an employee at the time of the happening of the events, and not be a person who is employed specifically to investigate and give an opinion relating to the effects of the events. That

(Testimony of Frank Hornkohl.)

would be the way I would view it as an adverse witness.

Now, if overnight you folks can do further research on it, I am always happy to change my mind if I am wrong.

Mr. Hamilton: I am in the peculiar position of knowing absolutely nothing of what Mr. Hornkohl's testimony would be, and on the basis of the admonition in 43(a) for a broad or liberal interpretation, and the fact that he was an employee, I felt it proper to call him as an adverse witness.

Mr. Barnard: I think Mr. Hamilton is misinterpreting the word employee. He has been an independent contractor employed to do a job.

The Court: Well, I am inclined to feel, Mr. Hamilton, presently that I would not permit you to cross examine him under the statement made. If you want to examine him on the foundation now, I will rule formally a little later as to [69] whether I will or will not permit it.

Mr. Hamilton: Let me go into the foundation then.

Mr. Barnard: Yes.

The Court: All right.

(The following proceedings were had in the hearing of the jury:)

Direct Examination

Q. (By Mr. Hamilton): Mr. Hornkohl, where do you reside?

A. I reside at 245 El Cerrito Drive, Bakersfield, California.

(Testimony of Frank Hornkohl.)

Q. What is your business or occupation, sir?

A. I am a graduate consulting chemical engineer, and I own and operate the Hornkohl Laboratories in Bakersfield.

Q. Mr. Hornkohl, were you sometime during 1957 employed by California Spray-Chemical Corporation to do certain work for them?

A. Yes, I was.

Q. What were you employed to do?

The Court: May we find out first, Mr. Hamilton, when?

Q. (By Mr. Hamilton): When were you employed by Cal-Spray?

A. On or about August 6, 1957.

Q. And what were you employed to do?

A. To make an examination of Mr. Grimm's ranch and to determine the extent of damage to his fruit trees. [70]

Q. Were you in any way employed to ascertain the nature or cause of the damage?

A. Yes, if possible.

Q. You, sir, went to Charles Grimm's ranch and in conversation with him informed him of this employment, is that correct?

A. That is correct.

Q. And you sought his permission to go into his orchard and do whatever you felt was necessary?

A. That is correct.

Q. And that permission was given to you by him? A. Yes.

Q. In the recent past, Mr. Hornkohl, and by that

(Testimony of Frank Hornkohl.)

I mean within the last day or so, did I come to your laboratory to talk to you about the work you had done for Cal-Spray? A. Yes.

Q. And is it not correct, sir, that you refused to give me any information as to what you did, or the results of your study?

A. That is correct.

Q. And the reasons that you gave were that you were employed by Cal-Spray, is that correct?

A. That is correct.

Q. And you owed a confidential relationship to Cal-Spray that would prevent you from disclosing the material which you [71] had gathered?

A. That is correct. That is my policy in all my work.

Q. At the time, sir, of your employment by Cal-Spray were you informed that your examination and the results thereof would like be used in a legal action?

A. I don't recall, no—I don't recall at that time that was—yes, I believe it was, there was a possibility of a legal action.

Q. In your own mind at the present time, do you regard yourself as still employed by Cal-Spray for that purpose?

A. As far as this report is concerned, that is their property, yes, sir.

Mr. Hamilton: I again ask leave of the Court to examine this witness as an adverse witness.

The Court: May I ask you, Mr. Hornkohl, I un-

(Testimony of Frank Hornkohl.)

derstand your business is operating and maintaining this laboratory?

The Witness: Yes, sir.

The Court: And are your services available to anybody who may seek your aid?

The Witness: That is right.

The Court: And is the work done by you based upon your own judgment and discretion, or does somebody tell you the details of what you have to do?

The Witness: Well, ordinarily they tell me what they want me to find out, and they leave it up to me to go ahead and [72] follow my own methods.

The Court: I think, Mr. Hamilton, that under the law I will have to rule that you cannot call this witness as an adverse witness.

Mr. Hamilton: May I have a reservation, sir, in this respect: if I may ascertain from cases overnight that it is proper, may I have leave of the Court to recall this witness?

The Court: Oh, yes. I will make my ruling subject to review if you care to have me review it, and if you find some cases I am always willing and ready to change my mind if I am wrong.

Mr. Hamilton: Thank you.

The Court: I want to say this, that the Court is not ruling, of course, that you can't call this witness as your own witness. The only thing I am ruling is that at the present stage I rule you cannot call him as an adverse witness.

(Testimony of Frank Hornkohl.)

Mr. Barnard: If the Court please, may I state also, we are not too far from the evening adjournment, and as far as Cal-Spray is concerned, we have no objection to Mr. Hamilton discussing this matter with Mr. Hornkohl this evening. I appreciate Mr. Hornkohl's feeling the other day when you called on him. We don't object, it is simply that we don't feel under the law he is an adverse witness. But if overnight you want to talk to Mr. Hornkohl, you have our permission.

Mr. Hamilton: From your statement, counsel, Mr. Hornkohl [73] may feel relieved of any confidential relationship presently existing between himself and Cal-Spray?

Mr. Barnard: Yes.

Mr. Hamilton: Thank you very kindly.

Q. Mr. Hornkohl, I understand that you are under a subpoena to appear in a legal action in Kern County tomorrow, is that correct?

A. That is correct.

Q. I also understand that it would be possible for you to return here on Thursday, is that correct?

A. That is correct.

The Court: Well, I am hoping, gentlemen, if we move along that we may not be involved in this trial on Thursday.

Mr. Barnard: If the Court please, I hate to be discouraging, but I don't think that is possible.

The Court: Well, one never knows if we move along.

(Testimony of Frank Hornkohl.)

I will say this to you, Mr. Hornkohl, that you are here in my court, and you are subject to the orders of this Court, and I will expect you to be here tomorrow unless between now and then you are relieved, and it makes it bad on a witness to be caught between cross fires of two courts.

The Witness: I was already subpoenaed in the other case prior to this.

The Court: Well, I must rule you are subject to the orders of this Court. [74]

The Witness: Oh, I see. I didn't know.

The Court: And so you remain in attendance unless we make some other arrangements about it.

The Witness: All right, sir.

The Court: Do you care to examine him further now?

Mr. Hamilton: Not at the present time, your Honor.

The Court: You may step down.

(Witness excused)

Mr. Hamilton: I will call Dr. C. O. Hesse.

C. O. HESSE

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: C. O. Hesse.

The Clerk: Have that seat.

Direct Examination

Q. (By Mr. Hamilton): You are C. O. Hesse, are you?
A. Yes.

(Testimony of C. O. Hesse.)

Q. Is that the correct pronunciation of your name, Hesse? A. Hesse.

Q. Your business or occupation, sir.

A. Professor of pathology and pomology, experiment station, University of California at Davis.

Mr. Barnard: What was that, pathology? [75]

The Witness: Pomology.

Q. (By Mr. Hamilton): Where did you take your initial schooling, sir?

A. University of Hawaii, Pasadena Junior College, University of California at Davis, and graduate work at University of Maryland, College Park, Maryland.

Q. What degrees have you obtained, sir?

A. A B.S. degree, and Doctor of Philosophy.

Q. Any other degrees? A. No, sir.

Q. How long have you been a professor of pomology at the Agricultural College at Davis?

A. Ten and a half years.

Q. What did you do prior to that time?

A. I was employed by the U.S. Department of Agriculture.

Q. In what capacity?

A. As a geneticist.

Q. That is a plant breeder, is that correct?

A. Yes, in plant breeding, tree fruit breeding.

Q. Your specialty in the department of pomology has to do with tree fruit?

A. Yes, sir, tree fruit breeding specifically.

Q. You, sir, visited the Charles Grimm Merrill Gem peach orchard in April of 1957, did you not?

(Testimony of C. O. Hesse.)

A. I did. [76]

Q. And you were in the company of one Al Rizzi?

A. That's right.

Q. And Dr. Richard Harris? Is that correct?

A. Yes.

Q. And also of Kenneth W. Hench?

A. Yes.

Q. That was, I believe, April 25th.

A. I do not recall the exact date, but it was in April.

Q. Who is Dr. Richard Harris?

A. Dr. Richard Harris was at the time assistant pomologist in the department of pomology at Davis, and has presently been transferred to another department of the University.

Q. Who is Al Rizzi?

A. Al Rizzi is extension specialist in pomology stationed at Davis.

Q. What were the circumstances under which you visited the Grimm ranch? In other words, what caused the three of you to make the trip to the Grimm ranch?

A. Dr. Harris and Mr. Rizzi told me they were visiting Kern and Fresno Counties to see extensive damage in orchards and asked me if I wanted to accompany them, and I did.

Q. The three of you were taken to the Grimm ranch by Kenneth Hench, is that correct?

A. That is correct. [77]

Q. And you made an examination of the Grimm Merrill Gem peach orchard, is that correct?

(Testimony of C. O. Hesse.)

A. Yes.

Q. Just explain briefly, sir, what you did by way of examination of that orchard.

A. We walked over probably between one-third and one-half of the orchard nearest to the buildings on the Grimm ranch, looking particularly for a pattern in the injury which was obvious, extended clear through the orchard. We peeled back and cut into the bark on the limbs as high as we could reach, even climbing the trees. We did not do extensive digging around the roots because we had been informed by Mr. Hench that he had dug extensively and found no root injury. Essentially that is the type of observation we made.

Q. First, sir, as to the overall appearance of the orchard, just visually, standing off looking at the orchard, did you notice anything abnormal or unusual?

A. Yes, many of the limbs were in a state of collapse, some foliage had emerged that at the time we visited was still green, but was completely collapsed and drying. The normal parts of the trees were well leafed out, and the contrast was very striking. There was no difficulty in seeing the damage.

Q. On your examination of the limbs, branches, the area above the surface of the ground, as I believe you [78] expressed it, you took a knife and peeled the bark back, did you see anything abnormal or unusual?

A. Yes, the wood from two years old down to

(Testimony of C. O. Hesse.)

the crotch of the tree particularly, there were brown areas in the cambium, in the bark, in the cambium and in the new wood, or last year's wood as the case might be, it was probably last year's wood but still living wood, which in most parts centered under the lenticel opening in the bark. And this was quite common, and some were severely damaged branches, or on the most severely damaged sides of the branches, there might be actual streaks of injured cambium and sapwood tissues.

Q. Would you, sir, explain to the jury what you mean by lenticel openings?

A. Well, lenticular openings are natural openings in the bark of many trees, especially those in which the peach is classified; they are actual openings in the under-side of the lenticel, which is a spongy, very loose mass of cells, and it affords a ready entry for gases, liquids, anything applied to the surface, there is no barrier there. It is an actual opening into the living bark area, where you come to living cells.

Q. Do those lenticel openings, or lenticular openings continue to exist throughout the life of the tree?

A. They will exist until the bark becomes rather old and [79] quite thick, in which case the cambium underneath may cut them off and more or less discontinue them, but certainly in a peach tree for the first ten years they are quite noticeable on the branches.

(Testimony of C. O. Hesse.)

Q. Do the lenticular openings get larger as the tree grows older, or that particular opening grows older?

A. As long as they exist they tend to elongate to some extent, especially in the first two or three years of their existence as the branch increases in diameter.

Q. Did you in your examination of the orchard notice any preponderance of injury to any particular side or area of the trees?

A. We looked at the orchards from that standpoint, perhaps in an overall survey we thought perhaps more limbs on the south side were killed, but it was not such a definite pattern we could conclude at that time that one side of the trees was more badly damaged than the other in all instances.

Q. In your capacity as a professor of pomology, you are familiar, are you not, sir, with the various infectious or pathogenic diseases of peach trees?

A. In a superficial manner, not in the manner of a plant pathologist.

Q. Did you, sir, notice any evidence or symptoms that were characteristic of any disease of peach trees, pathogenic disease of peach trees, in the Grimm orchard? [80]

A. No.

Q. You are familiar, are you not, sir, with the characteristics and symptoms of bacterial canker?

A. Yes, sir.

Q. You are familiar with the symptoms and characteristics of the bacterial disease called sour sap?

(Testimony of C. O. Hesse.)

A. That is a multiplicity of diseases, not a single one. Several things may cause sour sap.

Q. But you are familiar with it?

A. At least with the more common causes of so-called sour sap.

Q. Did the symptoms that you saw in the Grimm orchard correspond to those characteristics of any disease which you knew about from your reading, your experience, or your learning?

A. If it had been an isolated limb, I think one would have been suspicious, but with the preponderance of numbers that immediately was placed in our minds practically eliminated the disease factor, plus Mr. Hench's statement there was nothing wrong with the roots because he had dug around them previous to our visit.

Q. You met Mr. Grimm when you got to his ranch on that particular day? A. Yes, sir.

Q. Did you discuss with Mr. Grimm his spray program? [81]

A. He told us what had been applied and approximately when. I have no accurate recollection of the actual program, except an oil had been used and there were other amendments with it, or other spray materials.

Q. Do you recall the amount of oil that Mr. Grimm indicated he used?

A. My recollection is four per cent.

Q. Do you recall the type of oil that he stated he used?

(Testimony of C. O. Hesse.)

A. I believe at the time he called it a medium oil.

Q. I believe the principal abnormality that you discovered in peeling the bark you described as a browning of the cambium layer immediately below the lenticular opening, is that correct? A. Yes.

Q. Would that browning completely girdle the limb, or would it girdle some limbs but not others, or would it be less girdling in all cases?

A. Most of the limbs were not completely girdled by contiguous or overlapping brown areas. However, they were very numerous and I think it was our feeling at the time that actual damage extended beyond the—possibly beyond the actual area of browning. The brown cells were undoubtedly dead cells; others nearby may have been injured and not brown. But certainly there were enough in total extending up and down the limb as well as around it so [82] that it would be a very abnormal condition, and in my estimation certainly could have caused severe damage or death to the limbs.

Q. Sir, is the browning or burning, or necrosis of the cambium layer under the lenticular openings confined almost entirely to older wood, wood one year old and older—pardon me, two years old and older, with slight, if any, indication of damage on wood one year old or less, a characteristic of oil injury? A. I don't know.

Q. Did you, sir, form an opinion from your examination of the Grimm orchard, and your knowledge of the use of the oil as a part of the spray

(Testimony of C. O. Hesse.)

program, as to the cause of the condition of the orchard? A. Yes.

Q. And what was that opinion?

A. They said it was not only based on Mr. Grimm's orchard, but on other orchards observed, we felt it was due to the use of oil under the conditions which prevailed in 1957.

Q. I want you, sir, to accept this as a fact. I am going to ask you a hypothetical question. But accept it as a fact that the pattern of complete destruction, death of the primary limbs in the Grimm Merrill Gem peach orchard, the same orchard that you investigated, later developed to be predominantly on the southerly or southwesterly exposure of the tree. Just assume that to be a fact, and [83] putting that together with your observing of the browning or necrosis of the cambium layer, as you have described it, would that ultimate result of the preponderance of injury on the southerly side be a characteristic of oil injury?

A. Well, I don't know quite how to answer. You ask me to accept the fact the damage was on the southwest.

Q. Yes.

A. Whether that is a characteristic of oil injury, I truly cannot say.

Q. Sir, from your experience, from your reading, from your learning, does the temperature have any effect on the possibility of injury to stone fruit trees by oil?

(Testimony of C. O. Hesse.)

A. Well, it has been definitely shown very low temperatures have an effect, and the indications are that extremely abnormal high temperatures can also increase injury.

Q. In other words, abnormally high temperatures would increase the possibility of injury, is that a correct statement? A. Yes.

Q. By abnormally high temperatures, what do you mean, sir?

A. Well, most of the work has been reported, of course, as foliage sprays rather than dormant sprays, early season sprays, so that the abnormally high temperatures are probably 85 and higher. I have no direct experience in the intermediate temperature zones. [84]

Q. Would that abnormally high temperature relate itself to the particular season of the year, or the particular status of the tree, or would there be any inter-relation between that high temperature and the season? The point I am trying to make, sir, is that for the month of March an abnormally high temperature might be 70 degrees, whereas for the month of July an abnormally high temperature might be 110 degrees.

A. Unfortunately, sir, there is very little information on that for the very simple reason it is a very peculiar time to apply oil spray, the normal spray schedule does not call for it.

Q. In other words, a spray schedule using oil in the pink bud stage is abnormal, is that what you are saying?

(Testimony of C. O. Hesse.)

A. I would certainly think so for peaches.

Mr. Hamilton: You may cross examine.

Cross Examination

Q. (By Mr. Barnard): Dr. Hesse, you stated that you came to Kern and Fresno Counties in April of 1957, accompanying Mr. Rizzi,—Dr. Rizzi and Dr. Harris? A. Yes.

Q. For the purpose of seeing extensive damage in orchards, is that true? A. Yes, sir.

Q. Did you then visit other orchards, other than Mr. [85] Grimm's? A. Yes.

Q. And what orchards did you visit?

A. I can't call them by name, except one belonged to Mr. Estes, I believe the name is, near Fresno, east of Fresno, and another one, orchard North of Reedley, the owner's name I do not recall. I never met him before.

Q. All right, then, in other words, during this particular trip you visited three orchards?

A. Yes, sir, and drove by others.

Q. And was the same condition prevalent in all three orchards that you examined?

A. Essentially, yes, due to age of trees, sometimes the injury looked a little different, more severe or less severe, but it was essentially the same.

Q. In other words, what I meant is you were examining orchards which were substantially in the same condition? You weren't looking at orchards suffering a different disease or different injury altogether?

(Testimony of C. O. Hesse.)

A. We did not make extensive and exclusive surveys of these other orchards; we saw the type of injury and saw it repeated and therefore did not feel it necessary.

Q. And did you visit any orchards in Merced County? A. No.

Q. Or in Stanislaus County? [86]

A. No.

Q. Have you ever in the past made examination of orchards, peach orchards, in Merced or Stanislaus Counties? A. Yes.

Q. That is orchards suffering from a disease?

A. No, not under the situation where we made this examination.

Q. Are you familiar with the fact that some two or three years ago there was an epidemic of a disease called bacterial canker in Merced and Stanislaus Counties? A. Yes.

Q. And did you go down and examine any of those trees? A. No.

Q. Have you examined any orchard any place that was, in your opinion, suffering from bacterial canker?

A. Several years ago, one near Escalon.

Q. Near Escalon? A. Yes.

Q. What type of an orchard?

A. Cling peach orchard.

Q. Will you tell us the symptoms that you observed in that orchard?

A. Branches died. There were — this has been several years, and I did not make an exhaustive

(Testimony of C. O. Hesse.)

survey in that case, but branches died, usually the young growth was blasted, that [87] is brown. Of course, they would hardly start emerging before this condition arose and generally it affected more of the tree on this particular orchard; in other words, the whole tree would generally die out. These were all young trees, because the orchard never became well established.

Q. In other words, the orchard that you did see consisted at that time of young trees?

A. Yes.

Q. Have you examined an orchard with trees approximately four years old that were suffering from bacterial canker?

A. I have seen individual trees; never orchards of trees.

Q. And did you find in those individual trees substantially the same condition that you have just described in the orchard at Escalon?

A. Well, I would say because of difference in conditions it would be hard to compare. They were not the same year. I couldn't say whether they were exactly the same conditions as the orchard at Escalon or not.

Q. Now, referring to these other two orchards that you examined last spring, do you know what had been done to those orchards in the way of treatment earlier?

A. We know that both orchards we specifically observed had received oil spray.

Q. Do you know what kind of oil spray?

(Testimony of C. O. Hesse.)

A. No. [88]

Q. I don't mean manufacturer, I mean in other words——

A. No, I don't know what proprietary brand was used, or what weight.

Q. Have you ever seen a condition of this type in an orchard which had not received an oil spray?

A. No.

Q. Would the fact that adjoining the Grimm orchard—withdraw that. Doctor, will you tell me why two adjoining orchards, adjoining the Grimm orchard, having received the same spray treatment, would show none of the symptoms which you saw and which you have described?

A. Well, I would have no idea. Actually oil injury is very sporadic and peculiar in its occurrence, and without knowing a good deal more about it I couldn't express an opinion.

Q. That is true also, is it not, of the bacterial diseases?

A. Generally they can be cultured out, at least at the time we examined them, and Dr. Wilson testified he found no evidence of an organism. If he had said he found an organism I could very well change my mind, but he found none.

Q. But you recall, Doctor, don't you, that Dr. Wilson didn't know how long the limbs had been dead that he examined?

A. In view of the other testimony, and knowing something of his work, I assume it got to him in

(Testimony of C. O. Hesse.)

reasonably good [89] condition or he would not have made the examination.

Q. Doctor, you found brown areas in the cambium area of the limbs? A. Yes.

Q. And that is entirely consistent with a disease known as bacterial canker, is it not?

A. I can't say yes or no to that. I doubt that the occurrence of the brown area directly under the lenticel would be completely in accord with bacterial canker.

Q. Now, you just heard Dr. Wilson testify that the bacteria gets into the tree and affects it wherever there is an opening and wherever it can get in, didn't you? A. That is right.

Q. And the lenticel opening that you are talking about is an opening through the bark of the tree?

A. Yes, but, but I stated he found no organism.

Q. It is a fact, then, that that is a method by which the bacteria of these various diseases can get into the tree and affect it? A. Yes.

Q. The same as the way you say a spray could get in, or an oil, is that true? A. Yes.

Q. Now, had you found around those brown openings, these brown areas of the lenticel a sour odor, smell, would [90] that have indicated anything to you?

A. Not at that time. The limbs had been damaged for some time, by that I mean certainly a week or ten days before we got there, and had been sitting there in the warm weather so at the time we

(Testimony of C. O. Hesse.)

inspected them I don't think we would have put a great deal of reliance upon any odor.

Q. In other words, what you mean then is that the absence of the odor didn't mean too much to you, did it?

A. I don't recall they had any particular peculiar odor, but I do mean if there had been an odor I would not have put much reliance on it as a diagnostic characteristic after that much time.

Q. Had you known or had you examined the trees immediately after they became sick and found a sour odor in the discolored cambium layer, would that have meant anything to you?

A. Well, I am much in the position of Dr. Hench. I would have taken samples and sent them to a qualified pathologist.

Q. In other words, do I understand you to say that you do not consider yourself qualified to express an opinion as to whether those trees were diseased or not? A. That is right.

Q. Now, in the reading that you have done about this disease known as bacterial canker, it is true, is it not, [91] that it is frequently more widespread on the south side or the sunny side of the tree?

A. Dr. Wilson so testified, and I would certainly support his views, or accept them.

Q. All right. Then you testified to that temperatures—extremely high temperatures would affect a foliage spray, and you expressed the line as being—I don't mean to misinterpret you—as being roughly 85 degrees. Do I understand by that you do not be-

(Testimony of C. O. Hesse.)

lieve that heat would be a factor at a temperature below 85?

A. You understand the work I refer to is more in the nature of foliage spray. These definitely were not, and of course you would have to consider the heat at the point of application, or at the point where the injury occurs. That may not be the same as the ambient temperature outside.

Q. What you are referring to then is your experience with oils that are used as foliage spray?

A. Yes.

Q. To be sprayed directly on the foliage?

A. On leaves.

Q. On bushes, trees and plants? A. Yes.

Q. And you consider that with a temperature higher than 85 that should not be done?

A. I think it would be getting into the zone of danger. [92] None of these things are as sharp as one or two degrees; other factors affect as well.

Q. And would it be your opinion it would be safe at a temperature of around 70 degrees?

A. Normally one would consider that safe.

Mr. Barnard: I have no further questions.

Redirect Examination

Q. (By Mr. Hamilton): Dr. Hesse, as a plant breeder, will certain varieties of the same kind of fruit—now I am referring specifically to peaches—will certain varieties be more susceptible to a particular type of injury than other varieties?

(Testimony of C. O. Hesse.)

A. That is generally true no matter what the factor may be.

Q. Then I take it you would say that certain varieties of peach trees would be more susceptible to oil injury than other varieties?

A. I would expect that, yes.

Q. Let's back it down a little further, sir. Would individual trees of the same variety show more resistance to oil injury than other trees of the same variety?

A. Not in the same sense as the first question was posed. I think the second question would relate to the vigor and health and general—well, the best expression is general vigor of the tree. [93]

Q. Then given a difference in health and vigor, one would find a difference in resistance between trees of the same variety?

A. That would be possible, yes.

Q. I recognize that it would probably be unusual if you could answer this particular question, but do you have any information concerning whether or not the Merrill Gem peach tree might or might not be more susceptible to oil injury than some other varieties of peaches?

A. No, I would have no such information.

Q. You have no information on that?

A. No.

Mr. Hamilton: I have no further questions.

The Court: Will Dr. Hesse be needed further?

Mr. Barnard: I would like to ask just two questions.

(Testimony of C. O. Hesse.)

Recross Examination

Q. (By Mr. Barnard): Dr. Hesse, it is true also, is it not, that between various varieties of peach trees there is a greater or a lesser susceptibility to disease? A. Yes.

Q. And the same thing would apply in an orchard of the same variety, that a stronger tree will resist disease more than a weaker tree in the same orchard?

A. Sometimes vice versa, but there are differences due [94] to vigor.

Q. In other words, there are differences between trees of the same variety. I had it backwards, is that correct?

A. Well, there are conditions where the vigorous tree may prove more susceptible than a less vigorous one, and with other conditions the reverse may take effect.

Mr. Barnard: That is all.

The Court: Dr. Hesse, then, as far as the Court is concerned you are excused from further attendance.

The Witness: Thank you.

(Witness excused.)

The Court: Next witness.

Mr. Hamilton: We have the deposition which we might read into the record, your Honor. May we read it at this time?

The Court: You prefer to do that than to put on a live witness at the present time?

Mr. Hamilton: I would, yes, your Honor. I think

in the progression this is the one that should go next into the record.

The Court: All right.

Mr. Hamilton: I believe the original of the deposition is on file with the Court, the deposition of Everill Kirk Harper.

The Court: Mr. Barnard, will you assist Mr. Hamilton?

A deposition is the testimony of a witness, ladies and [95] gentlemen, taken out of the presence of the Court. The witness is put under oath, and the lawyers appear, and examine the witness as though he were in court, and that has been done in connection with this witness. One of the attorneys will read the questions that were propounded to that witness at the taking of the deposition, and the other lawyer will read the answers. All right.

Mr. Hamilton: Counsel, passing over the preliminary, the stipulations at the opening, may we commence with the direct examination on page 3, at line 3:

“Q. Would you state your name, please?”

“A. My name is Everill Kirk Harper.”

(The deposition was read into the record, Mr. Hamilton reading the questions, and Mr. Barnard the answers, of the direct examination.)

The Court: I think, Mr. Hamilton, we will have to conclude the reading of this in the morning. We will take our night recess at this time and we will reconvene court at 9:30 in the morning.

(Admonition to jury, and recess until 9:30 a.m., on April 9, 1958.) [96]

Wednesday, April 9, 1958, 9:30 a.m.

The Court: Do counsel note the presence of the jury?

Mr. Hamilton: So stipulated, your Honor.

Mr. Barnard: So stipulated, your Honor.

The Court: Do you wish to continue the reading of the deposition?

Mr. Barnard: Yes. If the Court please, we had completed the direct examination of Mr. Harper, so Mr. Hamilton and I will trade places for the cross examination.

The Court: Very well.

Mr. Barnard: Perhaps I should state for the record I am continuing reading the deposition of Everill Kirk Harper, the cross examination.

(The reading of the deposition was continued, with Mr. Barnard reading the questions, and Mr. Hamilton the answers, of the cross examination.)

Mr. Hamilton: There is redirect examination. We might just as well continue as we are, counsel.

Mr. Barnard: For the purpose of the record, I will state this is redirect examination.

(The balance of the deposition was read.)

Mr. Hamilton: I will call C. G. Weigle.

C. G. WEIGLE

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: C. G. Weigle.

The Clerk: Have that seat.

Direct Examination

Q. (By Mr. Hamilton): You are Dr. C. G. Weigle? A. That is my name, yes.

Q. Where do you reside, Dr. Weigle?

A. At 3429 Humboldt Way, Sacramento.

Q. And what is your business or occupation, sir?

A. I am an associate plant pathologist with the Bureau of Plant Pathology, State Department of Agriculture.

Q. The Farm Commissioners offices are a part of the State Department of Agriculture setup, are they not?

A. No, sir, they are independent departments of agriculture in each county, but they are coordinated and the work is cooperative with the State Department of Agriculture. The State Department of Agriculture acts in an advisory capacity to the county agricultural commissioners offices.

Q. Then such a person in the position of Kirk Harper, [100] whose deposition was just read, a deputy agricultural commissioner, would go to the State Department of Agriculture for further advice, is that correct?

A. That is correct, sir.

Q. How long have you been an associate plant

(Testimony of C. G. Weigle.)

pathologist with the State Department of Agriculture?

A. Since June of 1948, in my present capacity.

Q. Approximately ten years? A. Yes.

Q. And prior to that what did you do, Dr. Weigle?

A. Prior to that I had—prior to military service which began in 1942, I spent ten years, five years of which were as a graduate student at the University of California, two years in the department of entomology, two years in the department of plant pathology, and during those ten years I also spent between three and four years with the United States Department of Agriculture, working in the field on surveys for peach diseases in California.

Q. You spent a period of four years with the United States Department of Agriculture—

A. Yes.

Q. —specializing in diseases of peaches in California, is that correct?

A. The time more accurately is three and a half years, and the work was entirely on peach orchard inspection. [101]

Q. Dr. Weigle, where did you take your initial college work?

A. My undergraduate work was in bacteriology at Stanford University.

Q. And then from there you went to the University of California? A. That is correct, yes.

Q. And I believe you said you spent two years

(Testimony of C. G. Weigle.)

in entomology as a graduate student, and three years in pathology?

A. That is right, with the Department of Agriculture work interspersed between the two of those sessions.

Q. And there was a period of time when you were in the service? A. That is right.

Q. Dr. Weigle, in the spring of 1957 did you have an occasion to visit the Charles Grimm peach orchard south of Bakersfield? A. Yes, I did.

Q. Do you recall the date?

A. April 15, 1957.

Q. What happened that caused you to go to the Grimm ranch on that date?

A. I might enlarge a little bit here because of the reason—to explain my reason for having received material. My work is the operation of a diagnostic laboratory for [102] plant pathology. We receive specimens from various areas in the State, and most of them come through the county agricultural commissioners offices. The specimens are sent to us for determination as to the cause of disease or injury that they find. On April 11th we received a specimen of peach twigs and sections of small branches from the Agricultural Commissioner, Mr. Morley. At that time we did not know the property from which these twigs had originated, but Mr. Morley's request was for us to determine whether there was verticular disease or oil spray injury present. We examined the material for—

Mr. Barnard: If the Court please, I am going to

(Testimony of C. G. Weigle.)

object to the doctor testifying to results of his examination until the properties have been identified.

Mr. Hamilton: I think the objection is well taken.

The Court: All right, I——

The Witness: Its condition——

The Court: I will sustain the objection on the ground no proper foundation has been laid.

Q. (By Mr. Hamilton): Dr. Weigle, don't give us the results of your examination of the material that you received. We have it in the record that you did receive certain material from Mr. Morley, with a request that you make an examination of it.

A. That is right, yes. [103]

Q. Following that examination what did you do?

A. Following that examination, either the following day or the second day, we received a phone call from Mr. Grimm, who explained that——

Mr. Barnard: If the Court please, I will have to object to the telephone conversation.

The Court: I think that is as far as the witness can go.

Q. (By Mr. Hamilton): Don't give the conversation, Dr. Weigle. What happened as a result of that telephone call?

A. The result of the telephone call was that I on the 15th of April flew to Bakersfield, where I was met by Mr. Stockton; I believe he is the assistant agricultural commissioner of Kern County, who took me to Mr. Grimm's property.

(Testimony of C. G. Weigle.)

Q. You have mentioned a Mr. Morley. Who was Mr. Morley?

A. Agricultural Commissioner of the County.

Q. Of Kern County? A. Yes.

Q. Now, we have you at the Grimm ranch on April 15th, in the company of Mr. Stockton. What did you do there?

A. I met Mr. Grimm and Mr. Grimm's man, I believe named Mr. Davidson, and we proceeded into the block of peach trees which showed apparent injury or abnormal condition. We walked through most of the block, to obtain an overall picture of the condition of the trees, and then I started [104] to examine them in the fashion that has been described before, which is customary, of cutting into the wood, peeling the bark back, and with the aid of a shovel we removed soil from the crown and upper roots of one of the trees. We actually cut into eight or ten of the trees as far as the upper portions were concerned; we cut into the trunks rather deeply with an axe on two of the trees. My efforts were attempting to determine the extent of the internal symptoms and the disposition on the trees.

Q. And what abnormality did you find in your examination?

A. I found a dying bark of the twigs of the tree, the scorching of the leaves, the killing of the bark, and cambium, with the discoloration that has been described. I found that there was no evidence of abnormality in the larger roots or in the crown or in the trunks probably half way between the

(Testimony of C. G. Weigle.)

ground level and where the scaffold branches come out. I found that many of the large scaffolds and the larger branches were entirely girdled, causing the remaining leaves on the tips to die back and wilt. I was impressed with the confinement to a very large degree, almost entirely, to the southern half of the trees.

Q. You stated, Dr. Weigle, that occasionally, or on several occasions you found, I believe you said, primary scaffolds that were completely girdled. Completely girdled with what? [105]

A. With the killing of the bark and the cambium.

Q. You identified that killing with the browning or discoloration, brownish discoloration of the cambium, is that correct?

A. That is correct. Usually killed wood turns brown rather quickly.

Q. At the time that you were there, Dr. Weigle, did Mr. Grimm inform you of his spray program?

A. Yes, he did.

Q. Do you recall what he told you he had used?

A. As I recall, it was Ortho-K medium flowable oil, four per cent, four per cent lead arsenate, and two per cent Mitox.

Q. Now, I take it, to explain that more fully, a four per cent oil means four gallons of oil to 100 gallons of water, is that correct?

A. That is my opinion.

Q. And four per cent lead arsenate means four

(Testimony of C. G. Weigle.)

pounds of basic lead arsenate per 100 gallons of water?

A. In the same 100 gallons of water.

Q. And two per cent Mitox means two pounds of Mitox to 100 gallons of water, all in the same mixture, oil, lead arsenate and Mitox in the same 100 gallons of water?

A. I believe that is correct.

Q. At the time that you were there on April 15th, Dr. [106] Weigle, did you gather any material for the purpose of further analysis?

A. I did, yes.

Q. And how did you select the material that you gathered?

A. I selected material, as is our custom when we are trying to isolate an organism, from not the entire dead portion, but made an effort to select portions of wood containing the margin between the dead or dying portions and the live portions. I selected several sections of branches up to two inches in diameter, and a larger number of smaller pieces, smaller diameter wood perhaps from a quarter to one inch in diameter.

Q. What did you do with this material?

A. Placed them in a plastic bag, took them back to the airport with me when I returned to Sacramento.

Q. You took them to Sacramento with you?

A. Yes.

Q. Did you perform any cultures or laboratory work with this material?

(Testimony of C. G. Weigle.)

A. We examined them grossly first, and then made laboratory cultures to determine whether or not we could isolate any pathogenic organism.

Q. By a gross examination, what do you mean, sir?

A. Gross means observing the color of the outer bark, the absence or presence of exudation, the color and texture of the tissue when it is cut, and the absence or presence [107] of what we call fungus fruiting bodies, the four forming phases of fungi that produce disease.

Q. These matters that you have discussed are things that can be seen with the naked eye, or with a microscopic examination? Is that correct?

A. One or the other, yes.

Q. Now by the term producing cultures, what do you mean, sir?

A. We determine that portion of the plant material where we suspect any organism might be embedded; we remove the outer covering from that material; we sterilize the surface with a weak sterilant, one that sterilizes any contaminating organism on the surface but will not penetrate to destroy anything in the material, and then portions of it are placed on nutrient media which are suitable to the growth of bacteria and fungi.

Q. Now, you spoke of making a culture for the purpose of ascertaining whether any pathogenic disease was present. Am I correct in my understanding that by the use of the term pathogenic dis-

(Testimony of C. G. Weigle.)

ease you mean a disease that would be caused by a bacteria or a virus or a fungus?

A. Two of those are correct, bacteria and fungi we can culture in the laboratory. A virus cannot be cultured in the laboratory.

Q. Had there been a bacteria present, would your [108] culture have disclosed it?

A. It is seldom, if ever, early in the spring that we do not isolate bacteria that cause disease in peaches. If it had been later in the summer our chances would have been less.

Q. But this was early in the spring?

A. When the trees are actively growing we almost always are able to obtain the causing organism.

Q. From your physical and personal examination of the Grimm Merrill Gem peach orchard, then your laboratory analysis of the material that you gathered there, can you say, Dr. Weigle, with reasonable pathogenic certainty that no pathogenic disease was present in that orchard?

A. Judging from the symptoms that I saw in the orchard and the fact that we were not able to obtain any bacteria, pathogenic bacteria or fungi from the material cultured, I felt definitely certain that it was not a pathogenic disease.

Q. Doctor Weigle, in your laboratory work in Sacramento, how many specimens do you handle for diagnosis, let's say, in a period of a year?

A. Last year I examined—I would have to check our annual report to be specific, but I think it was

(Testimony of C. G. Weigle.)

close to 3,500 specimens of all types, but I do recall, because I was afraid I would be asked this question, that 1050 of those [109] specimens were fruits, nuts and grapes, of which I could estimate at least half are peaches, nectarines and almonds. That would make close to 500 during the past year.

Q. My mental gymnastics say that would be approximately 525 stone fruit specimens that you handled, diagnosed, coming through your laboratory in Sacramento this past year?

A. That is right.

Q. Dr. Weigle, did you observe anything in the Grimm orchard at the time that you personally visited that orchard that indicated to you some cause of the condition of the orchard?

A. The symptoms shown on the trees and the disposition of the symptoms on the trees led me to believe that a chemical injury had occurred.

Q. And knowing the spray formula that was used, sir, is there any part of that spray formula that could have caused the symptoms that you observed?

A. By a matter of elimination my opinion was that oil had caused the injury.

Mr. Hamilton: You may cross examine.

Cross Examination

Q. (By Mr. Barnard): Dr. Weigle, you stated that by elimination you reached the conclusion that the oil had caused the injury. You mean, in other

(Testimony of C. G. Weigle.)

words, that you eliminated the other [110] chemicals present in the spray formula?

A. Primarily by elimination, I meant by the elimination of pathogenic or climatic factors. Secondly, my elimination, as far as the other ingredients, was not arrived at at that time because I do not know, nor claim to be an expert on sprays or spray residues or spray effects. After my return to Sacramento, I discussed with the people who do deal with such things whether or not they felt the mixture was compatible.

Q. Do you mean, Dr. Weigle, that the opinion you have just expressed is not your opinion but is an opinion that someone else gave you from what they knew about oils and sprays?

A. The opinion of the use of the word "oil" is probably from other people's information. The opinion about chemical injury is my own.

Q. However, you are the expert in determining that there was no pathological symptom there, the rest of it you have adopted what someone else told you, is that true?

A. Yes, and combined with the fact that I have seen not a large number of times, but I have seen material in our laboratory which showed similar injury and also from which we could obtain no organisms, which I was told was accidental application of excess oil.

Q. Have you ever seen oil injury in an orchard?

A. Not in an orchard, no.

(Testimony of C. G. Weigle.)

Q. In other words, your experience was solely in the laboratory? A. That is right.

Q. Is that correct? A. Yes.

Q. So that you are not in a position to say that the condition of Mr. Grimm's trees as you saw them in April of 1957 was typical of the condition of trees which had received an oil burn, are you?

A. No, I couldn't say. In fact, if I had not known oil had been applied, I would not have used the word "oil".

Q. And as a matter of fact, your entire opinion is a negative one, isn't it, Doctor? You couldn't find bacteria so you decided it must be oil, because that is the only thing you knew about?

A. I knew it was not a disease, and my opinion was strong enough that I felt it was definitely not a disease. I knew that oil could produce injury because I had seen material which I was told was caused by oil injury. So that resulted in the opinion.

Q. Having decided that it could not be a disease, you would then guess that it was oil.

A. That is why I used the words by elimination. The only other factor in the problem that I could form an opinion [112] on as a contributing factor.

Q. Now, when you examined Mr. Grimm's orchard, and when you cut into the cambium layer of trees and branches, did the cambium layer appear to be darker than usual?

A. Yes, it was definitely darker.

Q. Did it exude a sour smell?

A. No, it did not.

(Testimony of C. G. Weigle.)

Q. It did not, no place? A. No.

Q. And was there a running of the sap or juice of the tree from these dark places on the limbs, branches? A. I observed no exudation.

Q. You didn't. Now, tell me, Doctor, had you observed those things, had the sour smell been present and had the running of the juices or gums been present, would that have caused you to feel that it might be a bacterial disease of some sort?

A. There are two diseases of which I know that will cause killing of the cambium and the bark and there is an exudate, one is bacterial canker, and the other is a fungus disease called phytophthora. That is a water mold fungus which most commonly attacks the crown of the tree. It has been seen to hit the tops of the trees and to kill even the larger branches. So had I seen an exudate and killing, I would have thought of both of those diseases——

Q. But as you—I beg your pardon.

A. I was going to complete about the odor. The sour sap odor, which is so commonly used, is a secondary type of breakdown. Bacterial canker or phytophthora canker, both in themselves do not at first produce a sour odor. It is fermentation that occurs after the wood has been killed or injured.

Q. And does that sour odor disappear after a period of time after the limb has been dead?

A. Not until it dries, I would say.

Q. And the limbs and branches that you tested were not dry?

(Testimony of C. G. Weigle.)

A. They were not dry; they were on the tree, still moist.

Q. So that in testing the limbs that were not dry you found no sour odor, no running of gum, although you did find a darkening of the cambium?

A. Yes.

Q. Now, in your laboratory, Doctor, did you run these tests yourself, or did someone else in the laboratory run them? A. I ran them myself.

Q. You did. And you also made the cultures in an effort to discover bacteria? A. Yes.

Q. Would those tests also disclose a fungus?

A. Yes, they would.

Q. And would they also disclose a virus?

A. No, they would not.

Q. They would not. Did you run any test to see whether or not a virus was present?

A. No, we did not, because we know of no virus disease that produces the symptoms we saw, and diagnosis of a virus disease requires as long as a year, using tests on guinea pig trees.

Q. Did you run any tests at all to determine whether or not the samples which you had taken had been affected, or the condition had been caused by oil? A. We know of no suitable test.

Q. So the answer is no, you did not?

A. No. We tried—I will say this: there has been a technique described where sections of wood containing oil can be stained with an oil soluble dye. We tried that with no result, but later we tried experimentally where we knew we had plenty of oil

(Testimony of C. G. Weigle.)

and it was still unsuccessful, so we say there is still no practical means of determining that.

Q. All right. Then, to summarize, Doctor, it is fair to say, is it not, that from your tests you reached the conclusion, or you were unable to find any evidence of the presence of bacteria?

A. Yes. [115]

Q. And that is as far as you went?

A. In the laboratory.

Q. In the laboratory. You made no other or further tests and you admittedly have had no experience with oil injury or oil burn, is that correct?

A. Other than the material that had been brought in to me in the laboratory.

Q. Yes. And so the opinion which you expressed in answer to Mr. Hamilton's question you have already told me was an opinion which was, except for your laboratory test, made up of what other people told you in discussing it with them?

A. As far as the cause of the injury.

Q. That is right. As far as the cause.

A. Yes. But to return to the negative aspect, I have never seen a disease that would produce the condition of the trees that I saw in the field.

Q. Did you go down to Stanislaus County a few years ago when they had an epidemic of bacterial canker?

A. Yes, I did. At that time we called it bacterial blast.

Q. Regardless of what you called it, did you

(Testimony of C. G. Weigle.)

go down when they had an epidemic of some disease in peaches, a year or so ago?

A. Not in peaches; I saw it on the almonds.

Q. Did you go down to, I believe it was in Merced County? [116] I may be wrong in my county. Did you go down to Merced County, near Atwater, two or three years ago, when they had an epidemic of some disease in peach trees?

A. No, I did not.

Q. You did not? A. No.

Q. Have you visited any orchard in the San Joaquin Valley in the last couple of years that was suffering from bacterial canker?

A. Not the San Joaquin. I have been to several in the Sacramento Valley, Butte, Sutter, Yuba Counties.

Q. And what conditions did you find there, that is condition of the trees?

A. The trees showed a bud and twig killing, with some extension of the dead bark down into the twigs, but in no case did I see any extension into the large scaffolds. It can happen, but I did not see it.

Q. In other words, it is just a question of difference in degree?

A. I saw the characteristic exudate from the trees, and I collected specimens which I brought back to the laboratory and cultured because of the bacterial problem.

Q. Can you tell us what was different about the Grimm orchard as you observed it than the or-

(Testimony of C. G. Weigle.)

chards which you observed in the Sacramento Valley, which you have now [117] determined to have been suffering from bacterial canker?

A. The trees in the field in the Sacramento Valley had dead and dying wood distributed fairly evenly over their area. There were none that I saw where the injury extended into the very large wood or into the trunk. There was some exudation. There was no appreciable odor.

Q. In either case?

A. I am talking of the Sacramento Valley now.

Q. Yes.

A. On the Grimm property the injury was by far predominantly on the south and southwest part of the trees. It was evident more on the large wood than on the one year old growth, and it extended in at least the two cases we cut with an axe half way down the trunk to the ground level. There was no appreciable gummy exudation, none to be significant as a symptom. Also there was no odor in the Grimm orchard.

Q. Is that all?

A. That is the two comparisons.

Q. Now, as a matter of fact, you know, don't you, Doctor, that in the San Joaquin Valley in particular bacterial canker usually is more prevalent on the south side of the tree, in other words, the sunny side in the spring?

A. I have never seen that situation. It may occur.

Mr. Barnard: I think that is all, Doctor. [118]

(Testimony of C. G. Weigle.)

Redirect Examination

Q. (By Mr. Hamilton): To clear this matter up, Dr. Weigle, you stated that it was your opinion that the cause of the condition of the Grimm Merrill Gem orchard was spray damage. Now, that was your opinion, was it not?

Mr. Barnard: If the Court please, I am going to object to this witness expressing any further opinion, since from his own testimony the opinion which he has already expressed is based on other person's knowledge. Now, I did not move to strike it because——

Mr. Hamilton: I want to clear it up.

Mr. Barnard: ——I wanted him to express it, but I don't think he is qualified to express further opinion on the question of oil.

The Court: Well, it was my understanding of the witness' testimony that from his examination and his general knowledge and laboratory tests and cultures, he expressed a definite opinion that the damage in the Grimm orchard was not a pathogenic disease. Is that the correct word?

The Witness: That is correct, pathogenic.

The Court: That he expressed the further statement that he had had no experience with oil sprays, that the statement he made concerning oil spray, as I understood him, was based upon his discussions and talks with others in the department [119] who were considered proficient or expert in that field. Now, that is my understanding of his testimony. Am I right or wrong?

(Testimony of C. G. Weigle.)

The Witness: I believe that is correct, sir.

Mr. Hamilton: I think that clears the matter up. My question was in reference to spray damage, not oil damage. I was under the impression the witness stated his opinion was spray damage. The particular part of the opinion came from conversations with others in the department. I think it is cleared up. Thank you.

The Court: We will take our morning recess at this time. Members of the jury, bear in mind the admonition I have given you, and we will have a short recess.

(Short recess.)

(Stipulated jury present.)

The Court: Do you have any further questions of Dr. Weigle?

Mr. Hamilton: I have nothing further.

Mr. Barnard: During the recess a matter was called to my attention. I would like to ask him a couple of questions.

Cross Examination—(Continued)

Q. (By Mr. Barnard): Dr. Weigle, previously I believe you stated that one of the factors which caused you to feel the Grimm orchard was not suffering from bacterial canker was that bacterial [120] canker occurred in the small limbs and not in the trunks the large limbs of the trees, is that correct?

A. Bacterial canker, I believe, is more likely to start in the young growth and work down into the

(Testimony of C. G. Weigle.)

larger limbs in those cases where it gets into the larger limbs.

Q. Doctor, are you acquainted with Dr. E. E. Wilson? A. I know Dr. Wilson, yes.

Q. Were you here yesterday when he testified?

A. I was.

Q. And you know that Dr. Wilson is a professor of plant pathology, University of California at Davis? A. Yes.

Q. Are you acquainted with an article which he wrote in a book entitled *Plant Diseases, The Yearbook of Agriculture 1953*, published by the United States Department of Agriculture?

A. Yes, I believe that is a summary of a group of papers that he wrote in the '30s on the disease.

Q. And are you acquainted with the article appearing on page 722 of that book entitled "Bacterial Canker of Stone Fruits"?

A. I would—I wouldn't know what page it was, but I know he has an article in there on bacterial canker.

Q. And may I call your attention to the fact that in that article there is just one paragraph I want to read. Dr. Wilson states: [121]

"The disease affects many parts of the tree, but the most common and most destructive phase is that on the trunks, limbs, and branches. There the pathogen enters the bark and makes circular to elongated, brown, water-soaked or gum-soaked lesions in the bark and outermost sapwood. Branches

(Testimony of C. G. Weigle.)

girdled by the canker may fail to grow in the spring. If they produce leaves and grow for a period, they die the first warm days of summer. The affected bark tissue is grown, gum-impregnated or water-soaked, and sour smelling."

Now, Doctor, in your opinion is that a correct description of the disease of bacterial canker, or is it wrong?

A. I will return to my use of the word "blast." Blast is that phase of the disease which we see in the spring where the organism has entered the blossoms or the young leaf buds as they open. The blossoms of course are only on the first year wood on peach trees, they do not occur on the older wood. The blast phase is sporadic in its occurrence, as far as being severe enough to cause economic loss. The year you mentioned, about three years ago, in the upper San Joaquin Valley, where the blast situation was so severe, was one of those years where almost all the blossoms became infected. In the average year, most years, there is a small amount of blast which occurs but not of economic [122] significance, and the disease does not progress much beyond the buds themselves or a few small twigs. Therefore, even though it occurs more frequently, I believe that it is more overlooked and it is the infection in the older parts of the wood that results in permanent damage to the tree. I agree with Dr. Wilson that the older wood infection is the most severe, costly form of disease.

(Testimony of C. G. Weigle.)

Q. As a matter of fact, Doctor, aren't they actually two different diseases?

A. No, they are not. They are the same organism expressing different symptoms under different climatic conditions.

Q. And you agree with Dr. Wilson that where it does occur in the trunks and in the limbs, the scaffold limbs, it is more severe than where it occurs in the blossoms and in the new growth?

A. Except in the sporadic outbreak, I agree it is most costly to the tree when it occurs in the older wood.

Q. And have you observed orchards which were suffering from bacterial canker in the trunks and in the major limbs? A. Yes, I have.

Q. And the orchards which you described when I first asked you that question, you distinguished from the Grimm orchard because it occurred in the twigs and in the blossoms. Now, confining yourself to the orchards where you saw it in [123] the trunks and in the limbs in the more severe condition, will you tell us what was the difference between those orchards and Mr. Grimm's orchard?

A. The outstanding example I recall is one during the floods of '55 where the trees had been under water, and that would explain its occurring all over the trees in those cases. Then other than the outbreak in 1955 of the blast, the disease can occur on the larger wood but it not confined to the larger limbs.

Q. Doctor, you are not answering my question.

(Testimony of C. G. Weigle.)

My question is, in the trees where you have seen it in the larger wood, in the trunks and in the scaffold branches, what was the difference to a visual observation of those trees than the trees in Mr. Grimm's orchard?

A. Oh. In addition to the large branches that were dying back, there were scattered smaller branches throughout the trees showing symptoms of disease.

The Court: To which are you referring now, the orchards that you examined previously, or the Grimm orchard when you make that statement?

The Witness: Your Honor, I am referring to the previous orchards where bacterial canker was diagnosed.

Q. (By Mr. Barnard): Now, would you mind repeating that statement?

The Court: Let's have Miss Schulke read it.

(Answer read.) [124]

Q. (By Mr. Barnard): And do I take it then that you found no smaller branches in the Grimm orchard showing symptoms of disease?

A. I found no smaller branches in the Grimm orchard showing injury on the north sides of the trees, the smaller branches on the south side of the trees were dying back apparently from injury below where the larger branches to which the twigs were attached had become girdled or severely injured.

Q. But they were dying?

A. They were dying from the girdling effect.

(Testimony of C. G. Weigle.)

Q. Were there any other differences between the orchards you have seen where the disease was occurring in the trunks and in the large branches, any other difference between those orchards and the Grimm orchard?

A. The absence of gumming in the Grimm orchard.

Q. The absence of gumming, and by that you mean——

A. Bleeding, gummy exudation from the injured wood.

Q. Any other differences?

A. The confinement of injury in the Grimm orchard to the one side of the trees in a uniform fashion.

Q. Confined to the south side?

A. South and southwest.

Q. Now, are you familiar, Doctor, referring again to the same treatise, to the same article written by Dr. Wilson, are you familiar with the fact that he states in [125] that article that the disease most frequently occurs on the south side of the trees?

A. I am not familiar with that statement, and I have not seen that condition.

Q. Did you hear him testify yesterday that it most frequently occurred on the south side of the trees?

A. I don't recall his wording, no.

Q. Is it *is* your opinion that is wrong?

A. I am in no position to quarrel with Dr.

(Testimony of C. G. Weigle.)

Wilson's observations, because he has worked for many years on the disease.

Q. And as a matter of fact, your experience has been largely confined to the laboratory?

A. Except for the four years with the United States Department of Agriculture.

Q. But you haven't made numerous trips out into the field to observe these conditions in the trees as they exist in the orchards, have you?

A. Not more than five or ten a year.

Q. Now, one other thing, Dr. Weigle, when a tree has been affected by bacterial canker and one, two or more of the scaffold limbs have died, is it a normal condition that as the growing season progresses the tree will throw out new shoots from below the point of injury?

A. Usually that occurs in trees that are quite severely [126] injured, and it occurs below attachment of the scaffold from the ground level.

Q. It does occur? A. It does occur.

Q. It does occur in trees that have been quite severely injured? A. Yes.

Q. And the new shoots come from below the point where the scaffold limbs were injured and died?

A. I have only seen it from the ground level, not from the scaffold itself.

Q. I misunderstood you. In other words, the new shoots come from the ground level?

A. That is right.

Q. And then do those new shoots go on and

(Testimony of C. G. Weigle.)

produce a new peach tree, in other words?

A. If they arise from the budded or upper portion of the tree. If they arise from below the portion of the line of union then they are shoots from the seedling and have no commercial value.

Q. But the reason that they arise, in other words, is that the disease bacterial canker does not affect the roots, does not affect the part of the tree below the ground? A. That is right.

Q. And the part of the tree above the ground having [127] been killed or been made at least very sick, the roots express themselves by throwing out new shoots? A. That is correct. They can.

Mr. Barnard: That is all.

The Court: Did you complete your answer?

The Witness: Yes, sir. Your Honor, I might add one statement, if I may.

The Court: Will you speak loud enough so we can all hear?

The Witness: One point I was going to make, counsel, is that that same effect can be produced mechanically, if a tree is cut with an axe or blade close to the ground it too will force suckers, which also amplifies the fact there has been no root injury in that case.

Redirect Examination

Q. (By Mr. Hamilton): Dr. Weigle, bacterial canker is an infectious disease, is it not?

A. That is correct.

Q. In other words, it will spread from tree to tree and from limb to limb on the same tree?

(Testimony of C. G. Weigle.)

A. Yes.

Q. So far as you know, are there any varieties of peaches that are resistant to bacterial canker?

A. Not as far as I know.

Q. So far as your knowledge is concerned, all varieties [128] of commercial peaches are equally susceptible to bacterial canker?

Mr. Barnard: Now, if the Court please, I think counsel should quit leading the witness.

Mr. Hamilton: I think it is a leading question.

The Court: Do you withdraw the question, Mr. Hamilton?

Mr. Hamilton: I will withdraw the question.

Q. Are all varieties of peaches equally susceptible to bacterial canker, Dr. Weigle?

A. I couldn't name by variety any difference in susceptibility, but knowing the nature of the stone fruit trees and the diseases that affect them, I am confident that there are differences in susceptibility.

Q. Are you familiar with the Blazing Gold variety of peach?

A. I am familiar with the variety.

Q. Are you familiar with the Gold Dust variety of peach?

A. Yes, I am.

Q. And you are familiar with the Merrill Gem variety of peach?

A. Yes.

Q. Between those three varieties is one any more resistant to bacterial canker than another, so far as you know?

A. I do not know. [129]

Q. Have you ever heard of one of those tree varieties being or less susceptible to bacterial canker?

(Testimony of C. G. Weigle.)

The Court: Well, I doubt if that is a proper question. The witness says he doesn't know, and that would be based upon his training and experience and knowledge and information, so I don't think whether he has heard it or not would add anything to this.

Mr. Hamilton: Very well, your Honor.

Q. Bacterial canker has been identified as a pathogenic disease of stone fruit trees for how many years?

A. It has been known since before the turn of the century. I don't believe its actual cause was determined until late '20s or early '30s.

Q. The positive identification is in the laboratory and by the culture method, is that not correct?

A. That is confirmatory identification, although many times it is determined by our inspectors in the field on the symptoms expressed in the field.

Q. Had there been bacterial canker in the Grimm Merrill Gem orchard, would your laboratory tests have disclosed its presence?

A. At that time of year I believe it would have, yes.

Mr. Hamilton: I have nothing further.

Mr. Barnard: Just a couple of questions, Doctor. [130]

Recross Examination

Q. (By Mr. Barnard): You stated that from your general knowledge of stone fruit trees you were confident that some varieties would be more susceptible to bacterial canker than others. Would

(Testimony of C. G. Weigle.)

the fact that a particular variety of what we call an early variety have anything to do with that?

A. I am not sure that it would, since the disease is known to spread even in the fall, and an early variety would not exhibit too much difference at leaf fall time than the later varieties of peaches.

Q. Is there any difference in the rate of growth and so forth in the spring between the early varieties and the later varieties?

A. Yes, there is a difference.

Q. Which grows the fastest?

A. The early varieties.

Q. And it is a fact, is it not, that a tree or a plant or even a human being which is growing very rapidly, and in other words is using up all of its energy, is then susceptible to disease?

A. I believe it was pointed out yesterday that it depends upon the disease. Some diseases will attack a more rapidly growing plant more readily than a devitalized one, and the reverse is true in some cases. [131]

Q. What is your opinion insofar as bacterial canker is concerned on peach trees?

A. I believe that the disease is more dependent upon the rainfall and the temperature relationship during the winter than it is on the rapid or non-rapid growth rate in the spring.

Q. Do I take it then that it is your opinion there would be no difference in susceptibility between early peaches and late peaches?

A. I don't know of any difference.

Q. You don't have an opinion as to whether

(Testimony of C. G. Weigle.)

that would be a factor? A. Right.

Mr. Barnard: Very well. Thank you.

The Court: Will Dr. Weigle be needed further?

Mr. Hamilton: Not that I know of, your Honor.

Mr. Barnard: No, I think not, your Honor.

The Court: As far as the Court is concerned, Doctor, you are excused from further attendance.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Hamilton: We will call Charles Grimm.

The Court: One of the jurors has a question, Mr. Peden.

The Juror: May I ask the official capacity of the testimony of Mr. Harper?

The Court: He was a deputy agricultural commissioner, [132] wasn't he, of Bakersfield, Kern County. Does that answer your question, Mr. Peden? Am I right in that statement?

Mr. Hamilton: That is correct.

The Court: Very well.

CHARLES WILLIAM GRIMM

the plaintiff, called as a witness in his own behalf, having been first duly sworn, was examined and testified as follows:

The Clerk: Just have that seat.

Direct Examination

Q. (By Mr. Hamilton): You are Charles W. Grimm, are you not? A. Yes.

Q. And you are the plaintiff in this action?

A. Yes.

(Testimony of Charles William Grimm.)

Q. What is your business or occupation, Mr. Grimm? A. I am a farmer.

Q. Are you also a fruit grower? A. Yes.

Q. How much land do you farm?

A. 240 acres.

Q. How much land is in orchard or vineyard?

A. 120 acres in vineyard and 36 acres in orchard.

Q. And what does the vineyard consist of?

A. Thompson seedless, Cardinals and Revere grapes.

Q. And what does your orchard consist of?

A. Blazing Gold peaches, Gold Dust peaches, Merrill Gem peaches, Sunrise nectarines, and Le-Grand nectarines.

Q. Mr. Grimm, how many acres are in Merrill Gem peaches? A. Approximately 8.2 acres.

Q. How many acres, Mr. Grimm, are in Blazing Gold peaches and Gold Dust peaches together?

A. About 11 acres.

Q. And are the three varieties of peaches all in the same orchard?

A. Yes, they are in the same orchard.

Q. Using just this diagram for a moment to show a portion, I notice here we have——

The Court: Mr. Hamilton, for the purpose of the record, I think we will have that marked Plaintiff's Exhibit No. 1 for identification.

Mr. Hamilton: Thank you, your Honor.

The Court: So if you will refer to it that way it will keep the record a little clearer.

(Testimony of Charles William Grimm.)

(The diagram referred to was marked as Plaintiff's Exhibit 1, for identification.)

Q. (By Mr. Hamilton): Referring to the diagram marked for identification as Plaintiff's Exhibit 1, I notice on the left hand side you have "row number". Your Blazing Gold and Gold Dust varieties of peaches, are they adjacent to row 1 or row 11? [134] A. Row number 11.

Q. In other words, if this diagram were extended upward beyond row 11, the next row would be what variety?

A. The row on the end that you are referring to would be Gold Dust variety.

Q. Does the Gold Dust variety run clear through the full length of the Merrill Gem?

A. No, it does not; it runs half way through.

Q. And does the Blazing Gold variety compose the other half of that next row?

A. That is correct.

Q. Is there any difference in the distance between each of the rows and the distances between the last row of Merrill Gems and the first row of Gold Dust or Blazing Gold?

A. There is no difference.

The Court: Mr. Hamilton, does each cross—and I assume it is a cross—represent a tree?

Mr. Hamilton: We may as well go into the diagram at the present time, your Honor.

Q. Mr. Grimm, for the purposes of use in this action, you made a tree by tree and row by row examination of your orchard, did you not?

A. Yes, I did.

(Testimony of Charles William Grimm.)

Q. And did you on a piece of paper smaller than this but of similar design make a mark depicting each tree? [135] A. Yes, I did.

Q. This particular diagram that has been marked for identification as the Plaintiff's Exhibit 1, is a blown up or an enlarged reproduction of the smaller document that you made, is that correct? A. That is correct.

Q. Now, to identify each of the characters on this diagram, row number one is on which side, directionwise, of your Merrill Gem orchard?

A. On the extreme south side.

Q. The point where the word "row" with a figure after it representing the row number is placed on the diagram, that then would be the westerly edge or end of your Merrill Gems?

A. That is correct.

Mr. Barnard: Excuse me, Mr. Hamilton. For the record, the word "row" appears on both ends.

Mr. Hamilton: I didn't notice that.

Mr. Barnard: Could we say that to the left of the diagram would be west, and to the right would be east?

Mr. Hamilton: That would be correct directionwise.

The Witness: That would be correct.

Q. (By Mr. Hamilton): Now, confining your attention to a number of characters following the words "row No. 1" as it appears on the left hand side of the diagram, the westerly edge [136] of the orchard, I notice a series of Xs. Do each one of those Xs represent a tree? A. Yes.

(Testimony of Charles William Grimm.)

Q. What kind—I don't mean varietywise because all the trees depicted on this diagram are Merrill Gems, is that correct?

A. That is correct.

Q. What condition is the tree represented by the letter X as it exists now?

A. This survey was made shortly after we sawed out the dead wood in the orchard, and the Xs indicates trees where no primary limbs were sawed out.

Q. Now when did you saw out the dead limbs?

A. In October.

Q. Of 1957? A. '57.

Q. And this survey was made immediately after that? A. That is correct.

Q. Then the letter X, wherever the letter X appears on this diagram, represents a tree that is in normal condition, or a tree that no major or primary limbs were cut off, is that correct?

A. That is correct.

Q. The next change in character as appears on the diagram is the letter one. Does that letter one also represent a tree? [137] A. That does.

Q. And what is the difference between the tree depicted by the letter one and the tree depicted by the letter X?

A. The letter one was indicated where one primary or major limb was cut off the tree.

Q. Then at this particular tree, and I am pointing to a figure one, that means that on that particular tree a major limb had been cut off?

A. That is correct.

Q. As we go on down this row number one, the

(Testimony of Charles William Grimm.)

next change in character is the figure two. Does that figure two also represent a tree?

A. That represents a tree and it also represents where two major limbs have been cut off.

Q. The next change of character as appears on the diagram, and going up the consecutive numbered rows, appears in row number four, and there appears on there the figure three. Does that figure three represent a tree?

A. That also represents a tree, and it also represents where three major limbs were sawed off.

Q. As we go on easterly, or to the right in row number four, I notice in various places the letter S. What does that letter S represent?

A. That represents a stump, or where we had to saw the tree down to the ground, or all the major scaffolds sawed off. [138]

The Court: Mr. Grimm, you are inclined to let your voice drop near the end of each sentence, and it might be difficult for all to hear. So bear it in mind, as it is important that everyone in the court room hear everything you say.

The Witness: I will try.

Q. (By Mr. Hamilton): Now, at the base of the diagram appear certain letters and figures with a row designation above, and under row number one, on the same diagram, is the letter 62-X. What does that mean?

A. That in row 2——

Q. No, we are referring to row 1, 62-X.

A. Well, you know, that is just a little far for me to read from here.

Q. You may step down.

(Testimony of Charles William Grimm.)

The Court: You may step down, but when you get down there, why, face the jury and the reporter, so we can hear what is said.

Q. (By Mr. Hamilton): Could you stand here, Mr. Grimm, and see the diagram.

A. Row 1 indicates there—

Q. I am referring to the 62-X.

A. There are 62 trees that no limbs were cut off, no primary limbs. [139]

Q. Just below 62-X appears the figure 2-1.

A. That indicates there were two trees where one limb was cut off.

Q. That is in this particular row number one?

A. Yes.

Q. And the last figure in the column is 2-2.

A. That indicates that there are two trees where two primary limbs were sawed off.

Q. And all of those are in this particular row?

A. That is correct.

Q. And each of the figures under the row designation at the bottom of this diagram indicate the same things? A. Same thing.

Q. If it is a 7-S that means under row number 4 that means in row 4 there were seven trees in which all of the primaries were cut off?

A. That is correct.

Q. 9-3 means that in row 4 nine trees had three of the primaries cut off?

A. That is correct.

Q. You may return to the witness stand, Mr. Grimm. No where on the diagram does there appear the total; in other words, the collective total-

(Testimony of Charles William Grimm.)

ing of all of the trees in the orchard. How many trees are there in this orchard, Mr. Grimm?

A. There are 726. [140]

Q. How many were cut back to the stump, that is with all of the primaries cut off?

A. There were 22.

Q. Isn't it a fact that one tree was killed entirely? A. That is correct.

Q. Now, is that one tree that was killed entirely part of the 22? A. That is correct.

Q. How many trees had three limbs, three primaries cut off? A. There were 58.

Q. How many trees had two major limbs cut off? A. 93.

Q. And how many trees had one major limb cut off? A. 128.

Q. And the balance of the trees in the orchard, the remaining part of the 726, had no major or primary limbs removed? A. That is correct.

Q. That was at the time of this pruning or cutting away of dead wood in October of 1957?

A. That was shortly after we did the sawing off of these limbs, prior to pruning.

Q. Mr. Grimm, in your orchard how many major limbs does the average tree have? [141]

A. I believe about five.

Q. Mr. Grimm, in the spring, early spring of 1957, January or February, you purchased some material from Cal-Spray? A. Yes.

Q. For use on your peach orchard?

A. Yes.

(Testimony of Charles William Grimm.)

Q. And the conversation, or your contact with Cal-Spray was through Tim Hanna, is that not correct? A. That is correct.

Q. One of the materials purchased and delivered to you was a light medium flowable oil, is that correct?

A. No, I will have to correct you. It was a medium oil, not a light medium.

Q. It was a medium flowable oil? A. Yes.

Q. At the time of the purchase of this oil, did you and Mr. Hanna have any substantial discussion of the amount of oil that you should use?

A. Yes, we did.

Q. Would you repeat, as best you can recollect, the conversation between you and Mr. Hanna?

A. Well, prior to the purchase of the oil, we discussed the spraying of the orchard, and the formula to be used. Mr. Hanna recommended that we use a four per cent medium oil [142] with lead arsenate and Mitox. I knew nothing of the Mitox because it was a new material to me, but I objected to the use of four per cent oil, and I told him at that time that I was fearful of its use. Well, he told me that he would find out more about it, and we would discuss it later. Prior—again prior to the application we had another discussion about the same formula, and he at that time contacted his office by radio, and was informed by someone that he later told me was Mr. Fisher that the four per cent oil was safe to use.

Q. It was on that basis that you used it?

(Testimony of Charles William Grimm.)

A. That was the basis on which I used it.

Q. Mr. Grimm, what was the condition of your Merrill Gem orchard on March 4, 1957?

A. I believe it was a normal orchard. I believe it was as good as any orchard in that vicinity.

The Court: May I inquire, Mr. Grimm, were your peach orchards planted the same year?

The Witness: No, they are different ages.

The Court: Oh. Well, may I inquire as to the Gem orchard?

The Witness: The Gem orchard was planted in 1953. The other orchards, the other peach orchard was planted in 1951.

The Court: That is the Blazing Gold?

The Witness: And Gold Dust.

The Court: But were all of your Gem peaches planted the [143] same year?

The Witness: Yes, sir, the same year.

The Court: That was in 1954?

The Witness: 1953.

The Court: 1953.

Mr. Hamilton: Thank you, your Honor.

Q. On March 4, 1957, Mr. Grimm, was your Merrill Gem orchard healthy?

A. It was healthy.

Q. Was it in vigorous growing condition?

A. Well, the wood looked vigorous. There was little or no foliage at that time.

Q. Were the buds showing? A. Yes.

Q. And that is both leaf buds and blossom buds, is that correct? A. Yes.

(Testimony of Charles William Grimm.)

Q. It was then in the pink bud stage?

A. Yes, it was in the pink bud stage.

Q. When did you apply the spray?

A. On the 5th and 6th of March, 1957.

Q. Had any of the blossoms opened by the 5th and 6th of March?

A. In the Merrill Gems there were a few blossoms that had cracked, what we call popcorn stage.

Q. I couldn't hear that last.

A. Popcorn.

The Court: Popcorn stage.

A. The buds, the fruit buds were swollen and cracked to where you could see the inner blossom.

Q. (By Mr. Hamilton): In other words, you could see the flower forming but it wasn't fully opened?

A. It wasn't fully opened, and in all cases, you couldn't in all cases see the blossoms themselves.

Q. Of the three varieties, Mr. Grimm, which if any are the earliest?

A. The Blazing Gold are the earliest.

Q. Was the blossoming on the Blazing Gold further advanced than that of the Merrill Gems?

A. Yes, they were.

Q. How about the Gold Dust? Is it earlier than the Merrill Gems? A. It is also earlier.

Q. And then the blossoming on the Gold Dust was further advanced? A. Yes.

Q. The least advanced was your Merrill Gems?

A. Yes, that is correct.

Q. And now, the description of the status of

(Testimony of Charles William Grimm.)

the buds [145] that you gave previously, the buds were swollen in certain cases, they were in what you call popcorn position, that is they were opening, the flower was visible but not completely opened. Does that refer to the Merrill Gems?

A. I was referring to the Blazing Gold.

Q. What was the condition of the Merrill Gems?

A. They were in the pink bud stage.

Q. Definitely pink bud stage. After the 5th and 6th of March, 1957, did you notice anything wrong with the orchard?

A. Shortly after that I did.

Q. By shortly after that, what do you mean, a week or ten days?

A. Within a week or so, I began to notice in the Blazing Gold particularly that some of the blossoms were beginning to fall, and on examination we found the pistils on some of the blossoms were burned, drying. We watched that for a few days and it seemed to clear up, but about that time Mr. Hanna called my attention to a lone Gem tree that showed a necrotic condition, and we watched that tree for several days. He suggested that we use a foliage nutrient to see if we could not stimulate it, and he did bring me out a bag of material, and I did intend to put it on, but about that time we began to discover that we had many trees starting to show that same symptom.

Q. Of what variety? [146]

A. Particularly the Gems. We had two trees in the Gold Dust that showed that symptom. But

(Testimony of Charles William Grimm.)

we had this condition progressively, it got worse day by day, and with the result that we had a very severely damaged orchard.

Q. Now, is that statement severely damaged orchard, is that applicable to the Gold Dust and the Blazing Gold peach trees, as well as the Gems, or is that confined to the Gems?

A. It is confined to the Gems. The two trees that we found in the Gold Dust eventually righted themselves and showed no further distress.

Q. Now, you have referred to Mr. Hanna. That is the same Tim Hanna who was an *employ* of Cal-Spray? A. Yes.

Q. During this period after March 5th and 6th of 1957, was Mr. Hanna at your orchard almost daily?

A. Well, he was there quite frequently. I wouldn't say he was there almost daily, but he was there quite frequently.

Q. And did you discuss with him various possibilities concerning what might be wrong with it and the possibilities of curing it?

A. Yes, I did.

Q. What, if anything, did Mr. Hanna do in obtaining assistance to ascertain the cause of the condition of the [147] Merrill Gem orchard?

A. The only thing that I know that he did, besides discussing with me certain possibilities that we might attempt, he took some soil samples. That is about all, I believe.

Q. Isn't it correct that he contacted the higher

(Testimony of Charles William Grimm.)

officials of the company to obtain some further advice for you?

A. Well, he did and I did too, I don't know which did it first.

Q. Who did you contact in Cal-Spray besides Mr. Hanna?

A. I attempted to get ahold of Mr. Robert Blois, and he did eventually come out, within a few days I believe.

Q. Who else did you get hold of, which California Spray-Chemical Corporation employee?

A. Directly I don't believe that I attempted to get ahold of anyone besides——

Q. Did Mr. Hanna bring other employees of the company to view your orchard? A. Yes.

Q. Who did he bring?

A. He brought Mr. Fisher, Mr. Hal Fisher, and Dr. Sessions.

Q. Do you know or do you recall when it was that Mr. Fisher and Dr. Sessions came to the orchard?

A. Well, they were there on several occasions, two or three occasions at least, and I would say that some time [148] between the middle and the last of March they were present there for the first time, and then during April and even as late as May perhaps.

Q. And during the same general period the men that we have heard from the witness stand came to your orchard and made their examinations they have talked about? A. That is correct.

(Testimony of Charles William Grimm.)

Mr. Barnard: If the Court please, I don't think that that is quite correct. I think counsel should correctly state it because the witness has just testified these people were there in the middle of March, and I believe all of the witnesses placed their visits in April, so the period is just too broad.

Mr. Hamilton: I believe the witness said from the middle of March up into May.

Mr. Barnard: That is correct, but your statement that the others visited at the same time is too broad.

Mr. Hamilton: I will narrow that.

Q. From time to time, and not at the same identical times, but during the same month of April, these other gentlemen that we have heard from the witness stand made their examinations of your orchard?

A. Yes, I believe there was one time when they were there when these other gentlemen were there also.

Q. When you say "they" who do you mean?

A. Dr. Sessions and Tim Hanna, I believe that they were there on one occasion when—I don't remember whether it was one of the boys from the University was there but I can't remember which one.

Mr. Hamilton (Showing document to counsel): You have seen this?

Mr. Barnard: Yes.

Mr. Hamilton: Would you mark these for identification?

(Testimony of Charles William Grimm.)

(The documents referred to were marked as Plaintiff's Exhibits 2 and 3 for identification.)

Q. (By Mr. Hamilton): Mr. Grimm, I show you two documents clipped together, marked for identification as Plaintiff's Exhibit 2. Would you look at those documents and tell me what they are?

A. Well, the first copy is the original and the second copy is a copy of the original for 72 four-pound bags of Ortho Mitox that was delivered to my ranch.

Q. Now, is that one of the materials used in the spray? A. Yes.

Q. And is this invoice for the material delivered to you for the purpose of using it in your spray? A. That is correct.

Mr. Hamilton: May I offer this into evidence.

The Court: Of course, there is no question, dispute between the parties that the defendant furnished the materials. [150] Is that right?

Mr. Barnard: I would think we could stipulate to that.

The Court: Well, I will have it marked in evidence as Plaintiff's Exhibit No. 1. It was my understanding there is no dispute or question between the parties on that.

(The document heretofore marked for identification as Plaintiff's Exhibit 2 was received in evidence.)

Q. (By Mr. Hamilton): Mr. Grimm, I show you two more documents which appear to be an original and copy. Are those the invoices for the

(Testimony of Charles William Grimm.)

other materials used in the spray program on the 6th and 7th of March 1957?

A. This includes the rest of the materials delivered to my ranch for spraying.

Mr. Hamilton: And I offer this in evidence, your Honor.

The Court: That will be received and marked Plaintiff's Exhibit 3.

(The document heretofore marked for identification as Plaintiff's Exhibit 3 was received in evidence.)

The Court: May I inquire, Mr. Grimm, did you seek the advice or services of the defendant, or did some employee of the defendant come to your ranch?

The Witness: Your Honor, I have purchased materials from California Spray-Chemical Company for about ten years.

The Court: I see. [151]

The Witness: And they were frequently on my ranch, and they made recommendations to me for other pest control problems.

The Court: I think we will recess, Mr. Hamilton, for lunch.

Mr. Barnard: Pardon me, but before we do, the diagram that was marked for identification, was it ever received in evidence.

The Court: I don't think it was offered.

Mr. Hamilton: I will offer it into evidence.

The Court: The document then on the board will be marked Plaintiff's Exhibit 1 in evidence.

(Testimony of Charles William Grimm.)

(The diagram heretofore marked for identification as Plaintiff's Exhibit 1 was received in evidence.)

(Admonition to the jury, and recess at 11:58 a.m., until 2:00 p.m. of the same day.) [152]

Afternoon Session—2:00 P.M.

(Stipulated the jury was present.)

The Court: All right.

CHARLES W. GRIMM

the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination—(Continued)

Mr. Hamilton: Would you mark these for identification, the whole group together?

(The documents referred to were marked as Plaintiff's Exhibit 4 for identification.)

Q. (By Mr. Hamilton): Mr. Grimm, just prior to the noon recess we had entered invoices of materials delivered to you by Cal-Spray for the purpose of use as a spray material on your peach orchard. Did you use all of that material?

A. No, I did not.

Q. I show you a group of documents, Mr. Grimm, three, appearing on their face to be Cal-Spray invoices of credit given to you for material returned. Are those the invoices showing the portion of the materials reflected in the other invoices that you returned to Cal-Spray?

(Testimony of Charles William Grimm.)

A. Yes, this is the material I returned to Cal-Spray.

Q. Included in those invoices, the ones you just have, [153] these are marked for identification as Plaintiff's Exhibit 4, are other and additional materials accumulated by you from Cal-Spray for use in other purposes?

A. Yes, there is an item of standard lead arsenate and other materials that were used on sprays for grapes from the previous year.

Mr. Hamilton: I offer these in evidence, your Honor.

The Court: They will be received and marked Plaintiff's Exhibit 4.

(The documents heretofore marked for identification as Plaintiff's Exhibit 4 were received in evidence.)

Q. (By Mr. Hamilton): Mr. Grimm, what is the spacing of the trees in your peach orchard?

A. They are 20 by 24 feet.

Q. In other words, each tree occupies a 20 by 24 foot space? A. Yes.

Q. Thank you. Mr. Grimm, I note on the invoice marked as Plaintiff's Exhibit 2, which indicates on its face a sale of Ortho Mitox 40 wettable, that the invoice carries the designation that it is for experimental sale. In conversations with Cal-Spray's employees prior to your purchase and use of this material did any of them say anything to you about any [154] part of the material being for experimental purposes?

(Testimony of Charles William Grimm.)

A. No, they did not.

Q. When did you first learn that the Mitox was designated by them as for experimental purposes?

A. Not until this action was actually started.

Q. And that was long after March 5th and 6th of 1957? A. Yes.

Mr. Hamilton: Will you mark these? I think they can be marked as a group, put them together with a staple.

(The pictures referred to were marked as Plaintiff's Exhibits 5, 6, 7, 8 and 9 for identification.)

Mr. Hamilton: Counsel, I believe these pictures were shown to you.

Mr. Barnard: I will look at them again.

Q. (By Mr. Hamilton): Mr. Grimm, I show you a group of pictures that have been marked for identification as Plaintiff's Exhibits 5 through 9. Would you look at those pictures and tell me what they depict?

A. These pictures depict the condition of these trees from probably about the middle of April on until these pictures were taken sometime in perhaps July.

Q. Did you yourself take those pictures?

A. No, I did not.

Q. Who took them? [155]

A. Mr. Roundtree.

Q. Are they pictures of your Merrill Gem peach orchard? A. They are.

The Court: I didn't quite understand your state-

(Testimony of Charles William Grimm.)

ment, Mr. Grimm. The pictures were taken in July?

The Witness: I believe it was about July that they were taken.

The Court: Well, I was under the impression you stated the pictures depicted the condition of the trees from about April until July.

The Witness: Perhaps I should restate that. What I tried to say was the trees appeared to be in about this condition from April until the pictures were taken.

The Court: I see.

Mr. Hamilton: I will offer these in evidence.

The Court: They will be received. They have been marked as one exhibit?

Mr. Hamilton: No, they are marked as Plaintiff's Exhibits 5 through 9.

The Court: All right, they will be received in evidence and be marked 5 through 9 in evidence.

(The pictures heretofore marked for identification as Plaintiff's Exhibits 5, 6, 7, 8 and 9 were received in evidence.)

Mr. Hamilton: Thank you. May I show them to the jury?

The Court: Yes. Divide them up. [156]

(The exhibits were passed to the jury.)

Mr. Hamilton (After showing to counsel): Mr. Clerk, I think these could be marked as one exhibit, they can be put together with a rubber band or paper clip.

(Testimony of Charles William Grimm.)

(The documents referred to were marked as Plaintiff's Exhibit 10 for identification.)

Q. (By Mr. Hamilton): Mr. Grimm, I show you another group of pictures that collectively have been marked for identification as Plaintiff's Exhibit 10. Would you look at those pictures and tell me what they depict?

A. Of this group there are two pictures of normal trees, that is trees that were undamaged or apparently undamaged, and the balance represent the various stages of cutting that was necessary to remove the dead portions of the limbs of the trees.

Q. Now, are those pictures of your Merrill Gem peach orchard?

A. They are all Merrill Gem peach orchard.

Q. Who took those pictures?

A. I took these myself.

Q. When were they taken?

A. These were taken, part of these pictures—this group of pictures was taken immediately at pruning time.

Q. In 1957? [157]

A. Probably December or January, 1957 or the first part of 1958. There is one picture that I attempted to show the sun burn caused from the exposure to the sun.

Mr. Hamilton: I offer these into evidence.

Mr. Barnard: Could I request that you ask Mr. Grimm to segregate the two pictures that are normal trees, and have them marked A and B?

The Court: Well, how many are there?

(Testimony of Charles William Grimm.)

Mr. Hamilton: There are two.

Mr. Barnard: There are 16 altogether.

The Court: Oh, there are 16 altogether.

Mr. Hamilton: Two show it.

The Court: You have had them all marked as one for identification?

Mr. Hamilton: They have been marked as one for identification.

The Court: We will mark the two that as I understand reflect or indicate the normal condition of the trees at the time the pictures were taken, we will mark those 10-A and 10-B. Now, it seems to me that there was another one that Mr. Grimm indicated showed——

Mr. Hamilton: He did indicate an attempt to show sun burn. Would you select that picture, Mr. Grimm.

The Court: That one will be marked 10-C. And the remaining ones, Mr. Grimm, would you just describe what they [158] show as a group?

The Witness: As a group they show the various stages of sawing that was necessary to remove the dead wood.

The Court: Well, those then will remain Plaintiff's 10 for identification.

Mr. Hamilton: I offer these in evidence and may they be accepted, 10-A, 10-B and 10-C.

Mr. Barnard: I have no objection.

The Court: All right. Does that include the remaining group?

(Testimony of Charles William Grimm.)

Mr. Hamilton: Yes, that includes the others marked for identification as Plaintiff's 10.

The Court: All right. They will be received then and marked Plaintiff's Exhibit 10 in evidence, and the ones specifically designated will be marked 10-A, 10-B and 10-C, as they have already been marked.

(The documents referred to were received as Plaintiff's Exhibit 10, and 10-A, 10-B and 10-C.)

(The exhibits were passed to the jury.)

Mr. Hamilton: I think these can all be marked as one exhibit.

(The documents referred to were marked as Plaintiff's Exhibit 11 for identification.)

Q. (By Mr. Hamilton): Mr. Grimm, I show you another group of pictures that [159] have been marked collectively as Plaintiff's Exhibit 11. Would you look at those pictures and tell me what they depict, who took them, and the date on which they were taken?

A. I took these pictures and they depict the same situation as we have in the other group.

Q. When were they taken?

A. They were taken prior to the time of these last pictures.

Q. At approximately what date?

A. About a month later.

Q. And they are pictures of your Merrill Gem peach orchard?

A. There is one thing that I must point out.

(Testimony of Charles William Grimm.)

There may be duplications in this group and in that group. In other words, there may be the same shot of a tree in this group as in that.

Mr. Hamilton: I offer these in evidence, your Honor.

The Court: They will be received, and how are they marked?

The Clerk: There were six.

Mr. Hamilton: Marked Plaintiff's Exhibit 11.

The Court: All right, they will be received then as one exhibit.

(The pictures heretofore marked for identification as Plaintiff's Exhibit 11 were received in evidence.)

(The exhibits were passed to the jury.) [160]

Q. (By Mr. Hamilton): Mr. Grimm, after March 5th and 6th, and while the investigation of your Merrill Gem orchard was under way to ascertain if possible the cause of the condition of the orchard, did an Alwyn C. Sessions come to your orchard? A. Yes, he did.

Q. And in what capacity did he appear there?

A. He was with—he is with California Spray-Chemical and is their plant pathologist.

Q. Were you told in advance by any employee of Cal-Spray that he was coming?

A. I don't recall that I was.

Q. You met Dr. Sessions at the ranch when he arrived there, did you not? A. Yes.

Q. Do you recall having a conversation with him? A. Yes.

(Testimony of Charles William Grimm.)

Q. At the time of his arrival?

A. Yes, I do.

Q. Was that conversation at a place where you could view the Merrill Gem peach orchard?

A. Yes, we were in the Merrill Gem peach orchard.

Q. Who was present at that time besides yourself and Dr. Sessions?

A. Well, one time that I remember specifically was [161] at the same time that Dr. Hesse was there. Excuse me, I will have to correct that name.

Q. I am referring, Mr. Grimm, to your meeting Dr. Sessions. Did you have a conversation with him?

A. Well, he has been there several times. The first time that he saw the orchard he asked me if we had used any fertilizers and if we had used a herbicide or a weed oil in the orchard.

Q. What is a herbicide?

A. It is a material used to kill weeds.

Q. Now, at the time of that conversation, can you recall who else was present besides yourself and Dr. Sessions? A. Yes,—

Q. And participated in the conversation.

A. Mr. Hanna, I believe was there.

Q. Anyone else that you recall?

A. I don't remember whether Mr. Blois was there or not.

Q. Were you in the Merrill Gem orchard at the time of that conversation? A. Yes, we were.

Q. What was your reply?

(Testimony of Charles William Grimm.)

A. I told him that we had used neither fertilizer nor weed oil.

Q. Did you tell him what you had used?

A. Yes, he knew what we had used. [162]

Q. What was it that you told him you had used?

A. I told him that we had used the oil, Mitox and lead arsenate.

Q. Mr. Grimm, do you have any other Merrill Gem trees on your ranch besides the Merrill Gem trees that are depicted by the map, if I may call it so, marked and entered as Plaintiff's Exhibit 1?

A. Yes, I do.

Q. How far are those other Merrill Gem trees from the commercial Merrill Gem orchard?

A. I would estimate about 300 feet.

Q. In other words, about 100 yards?

A. Yes.

Q. And am I correct that they lie just easterly of the easterly end of the Merrill Gem orchard, about 100 yards space between?

A. Yes, they do.

Q. How many of those are there?

A. There are about 18 now.

Q. And how does it happen that you had those?

A. They were in the original shipment when I planted this orchard, and we set them around a reservoir for one year. I thought at that time that would be the place to put them. I later decided they were in the way and I transplanted them into the row they are now in. [163]

Q. Now, those trees are located near and be-

(Testimony of Charles William Grimm.)

hind the ranch house located on your ranch?

A. Yes.

Q. And is there a sort of family orchard located in that area? A. Yes, there is.

Q. And these Merrill Gems are part of that family orchard?

A. They actually separate the nectarine orchard and the family orchard.

Q. Were those Merrill Gem trees sprayed with this formula, four per cent oil, four pounds of lead arsenate and two pounds of Mitox?

A. No, they were not.

Q. At the time that the serious condition developed in the Merrill Gem orchard that is depicted by Plaintiff's Exhibit 1, did those 18 Merrill Gem trees show any such symptoms or characteristics? A. None whatsoever.

Q. Have they remained in a normal healthy condition? A. They have.

Q. Mr. Grimm, you produced some Merrill Gem peaches in 1957, did you not? A. Yes, I did.

Q. And how many did you produce?

A. We shipped 1756 boxes, or lugs. [164]

Q. And what was your gross f.o.b.—your ranch price received for those peaches?

A. \$4.38 per lug.

Q. Mr. Grimm, what does it cost you, or what did it cost you in 1957 to pick, pack, and provide the lug and liner for those peaches?

A. For the Gem peaches?

Q. Yes.

(Testimony of Charles William Grimm.)

A. Well, I had an overall figure for all of my peaches for about \$1.15 per box, but I expect this cost me more in picking than the other varieties.

Q. Were your peaches picked by piece work?

A. No, it was hour work.

Q. Well, what was the overall average price for picking? A. For picking?

Q. Yes.

A. About 40 cents, picking and hauling.

The Court: You mean 40 cents a lug?

The Witness: Yes.

Q. (By Mr. Hamilton): And the packing?

A. Packing about 30 cents.

Q. Now, you packed your own peaches on your own ranch?

A. Yes, packed and graded. We figured that all in one.

Q. And the cost of the lug, the box itself and the liner? [165]

A. Box, paper, cover, averaged about 45 cents.

Q. Making \$1.15, total? A. Yes.

Q. Mr. Grimm, when was this Merrill Gem peach orchard planted?

A. In 1953, in February 1953.

Q. Then by a process of mathematics it was four years old in the spring of 1957, is that correct? A. Yes.

Q. And as you orchardists speak of it, it was going into its fifth season, is that correct?

A. That is correct.

(Testimony of Charles William Grimm.)

Q. Mr. Grimm, you have no prior history of experience with Merrill Gem peach varieties?

A. No, I have not.

Q. Mr. Grimm, in the year of 1957 did the condition of your orchard, by reason of the loss of limbs, require any extraordinary expenditures on your part? A. Yes, it did.

Q. And what were those, Mr. Grimm?

A. Well, I would say my picking cost me more money, my thinning cost me more money. Of course, removing—sawing and removing all of the limbs, and whitewashing the trees to prevent further sun burn.

Q. Did you purchase props to use in the orchard? [166] A. No, I have not yet.

Q. Will you be required to purchase props?

A. Yes, I expect to.

Q. But you have not purchased any as yet?

A. No.

Q. How many will be required for your use in the Merrill Gem orchard?

A. Well, the best I could estimate between 350 and '60.

Q. And what is the cost of those props?

A. About 50 cents each.

Q. If this damage had not occurred in your orchard, would it have been necessary for you to use props? A. No.

Q. Will there be any extra labor involved in putting out the props? A. Oh, yes.

(Testimony of Charles William Grimm.)

Q. Do you have any estimate in mind of the cost of that labor?

A. Oh, I would say somewhere probably around \$200, such a matter.

Q. How many years will it be necessary to use props, assuming that your orchard in the normal course of events shapes up?

A. I estimate at least two years.

Q. Now, the figure that you have given us of \$200, do [167] you feel that will cover that labor for the two years? A. It may.

Q. Mr. Grimm, did you find it necessary by reason of the necessity of cutting away portions of the trees to whitewash your Merrill Gem orchard?

A. Yes, I did.

Q. Why?

The Court: He has testified, I think, it prevent sun burning, haven't you?

The Witness: Yes.

Q. (By Mr. Hamilton): Have you whitewashed it? A. Yes, I have.

Q. What was the cost of the whitewashing?

A. It run about \$90, I believe.

Q. Will it be necessary to whitewash it again?

A. I think it should be whitewashed at least another year.

Q. And do you estimate that will be the same cost? A. I would think so, yes.

Q. Mr. Grimm, by reason of the condition that developed in your Merrill Gem orchard was it necessary for you to attempt to reshape your trees?

(Testimony of Charles William Grimm.)

A. Yes.

Q. Now, that would be necessary only on those trees where [168] a major limb or more had been cut away, is that correct? A. Yes.

Q. How do you do that?

A. It is done through a process of propping and tying. It is necessary to cut either a limb or a stake, and pry between one and another and perhaps take a piece of tree rope and pull from one limb to another, and try to establish the limb in a position that will prevent sunburn and to make the tree symmetrical in shape.

Q. And is it sometimes necessary to start from a ring in the middle and then go out to the ends to pull them up, into an upright position?

A. That is right.

Q. Have you done that?

A. I have done that on part of the trees.

Q. Do you have the cost of reshaping the trees?

A. I couldn't give you that exactly, I don't believe.

Q. Do you have an estimate of it?

A. It would run several hundred dollars, I am not sure.

Q. What would be your best estimate?

A. Perhaps \$260 or '70.

Q. \$260 or \$270? A. Yes.

Q. In October of 1957 you went into your orchard and cut away all dead wood, is that correct?

A. Yes.

Q. And that was not the ordinary pruning job,

(Testimony of Charles William Grimm.)

that was to cut away the dead wood caused by the condition that developed in the orchard during the spring? A. Yes.

Q. What was the cost of that operation?

A. My records show that it cost me about \$480 some odd dollars.

Q. Do you have an exact figure in mind, sir?

A. I believe it was \$484.50, if I am not mistaken.

Q. What all went into making up that total?

A. Well, I happened to have a pneumatic compressor that I used on a pruning platform, and in order to save the labor that would be required to saw all those limbs I purchased a pneumatic saw that cost me \$225, and with the tractor and three men we sawed these limbs out.

Q. Now does this figure also include the hauling of the limbs away, and stacking them and burning? A. Yes, that included the hauling.

Q. Mr. Grimm, in your opinion what was the fair market value of your Merrill Gem peach orchard on or about March 4, of 1957?

A. Well, I heard an expert testify yesterday——

Q. No. I want your opinion. You as the owner of the property are entitled to give your own independent opinion. [170]

A. Well, I would say somewhere between \$2,000 and \$2,500 an acre.

Q. The middle between there is \$2,250; is that your opinion? A. Yes.

Q. As to its value on that date? A. Yes.

Q. Mr. Grimm, in your opinion what is the

(Testimony of Charles William Grimm.)

fair market value of your Merrill Gem peach orchard today?

A. Well, I would estimate that it is probably between \$1,500 and \$1,600 an acre.

Q. The middle between is \$1,550. A. Yes.

Q. Is that your opinion?

A. Yes, that is what I would estimate it.

Q. Now, in fixing that value, do you take into account the fact that there will, by reason of the limbs that have been cut away, be a period temporary but certain in which you will suffer a loss in production? A. Yes, I definitely will.

Q. Well, is that fact taken into account in fixing the value of \$1,550, or is that the value you would place on it when it has reached the stage of maximum re-growth?

A. I would fix that on it after it has reached the maximum stage of re-growth. [171]

Q. And from your knowledge of peaches and knowledge of Merrill Gem, limited though it may be, when can it be expected to have reached the maximum re-growth?

A. Perhaps about four years.

Q. Is that four years from 1957, or four years from the present? A. From 1957.

Q. Mr. Grimm, Dr. Sessions was on your ranch on several occasions? A. Yes, he was.

Q. Do you recall how many?

A. I remember about three times, I believe.

Q. Was that during the spring of 1957?

A. That was during 1957.

(Testimony of Charles William Grimm.)

Q. And Dr. Sessions has been to your ranch quite recently?

A. Yes, he was there about three weeks ago.

Q. After Dr. Sessions had been there for the third time, in 1957, did you have any conversation with Mr. Fisher, the manager of Cal-Spray's Bakersfield office, concerning damage to your orchard?

A. Yes, I did.

Q. Do you recall approximately when you had that conversation, the approximate date?

A. The first time he was there was some time in March, and I have had conversations with him all during that period, [172] the several times that he was there.

Q. I am referring now to a conversation after Dr. Sessions had completed his examination. Do you recall such a conversation?

A. Yes, I remember a conversation.

Q. Do you recall the approximate date?

A. It was the last time that Mr. Fisher was there, and it was some time in June.

Q. And at the time of that conversation, and with you or with Mr. Fisher was anyone else present?

A. I don't believe there was anyone else present at that meeting.

The Court: Mr. Hamilton, I think we will take our afternoon recess. I have a long distance call from Los Angeles. Members of the jury, bear in mind the admonition I have given you. We will take a short recess.

(Testimony of Charles William Grimm.)

(Short recess.)

(Stipulated jury present.)

Q. (By Mr. Hamilton): Mr. Grimm, at the time of recess we had started to develop a conversation which you had with Mr. Hal Fisher, that I believe was in or about June of 1957, and I had asked you, I believe, who else was present besides you and Mr. Fisher, at that conversation?

A. There was no one else present. [173]

Q. What, as best you can recall, was said by you and what was said by Mr. Fisher in that conversation?

A. I inquired of Mr. Fisher when this adjuster, who he had previously indicated would come down from Richmond to settle this damage, was going to appear, that I had felt that we had exhausted our research in trying to develop any organism that might be present, and that I wanted to settle this case. And he informed me that the adjuster was not coming down, and he said as a matter of fact the next time we come down we would like to start pulling some of these trees. I told him at that time I felt that when he owned the orchard, or when he had bought the orchard he could start pulling trees, and not until then.

Q. Had you had an earlier conversation with Mr. Fisher concerning the adjuster?

A. Yes, I had.

Q. When did that conversation occur?

A. That was in the latter part of April.

Q. And where? A. At my ranch.

(Testimony of Charles William Grimm.)

Q. And who was present at the time of that conversation, besides you and Mr. Fisher?

A. Mr. Hanna.

Q. And did you have a conversation concerning the cause of the damage to your orchard? [174]

A. Yes.

Q. If you can recall, what did you state to Mr. Fisher, and what did he reply to you?

A. I told Mr. Fisher that I thought it was oil damage and he agreed with me, and he told me not to worry, that—he said, as near as I can remember his words, that the man from Richmond that carried the checkbook would be down to see me and we will settle this case.

Q. Mr. Grimm, how long have you owned the property on which your Merrill Gem peach orchard is located? A. Since 1942.

Q. How long have you had crops on there, such as grapes or peaches or nectarines, that might be susceptible to frost damage?

A. I believe I planted my first vineyard in 1937 or '38.

Q. 1937? A. '47 or '48, excuse me.

Q. Since the time of that planting in 1947 or 1948, have you ever suffered any frost damage?

A. None whatever.

Q. Mr. Grimm, do you have any heating equipment? A. No heating equipment.

Q. In your opinion at your ranch and from the history of it, would you completely discount frost

(Testimony of Charles William Grimm.)

as being a factor in connection with expectable production in future years? [175]

A. Well, I don't know that I could over future years. From the historical standpoint I could say for the next ten years perhaps, I could say it would be of minor importance.

Mr. Hamilton: You may cross examine.

Cross Examination

Q. (By Mr. Barnard): Mr. Grimm, you in the past were in the farm adviser's office in Kern County, were you not? Or the agricultural commissioner's office?

A. Yes, county agricultural commissioner.

Q. County agricultural commissioner, and during what years?

The Court: Well, I don't quite understand your question. You asked Mr. Grimm if he was in the——

Mr. Barnard: County agricultural commissioner's office.

The Court: What do you mean by "in"?

Mr. Barnard: Employed by them?

The Court: Oh.

Mr. Barnard: I will withdraw my previous question.

Q. You were the county agricultural commissioner for Kern County? A. Yes.

Q. And what years?

A. I was commissioner from 1951 to '54—correction, [176] '50 to '53.

(Testimony of Charles William Grimm.)

Q. 1950 to 1953. Was Mr. Harper employed in that office while you were there?

A. Yes, I employed Mr. Harper about three months prior to my retirement.

Q. All right. Now, this morning in explaining your diagram, Mr. Grimm, you stated that the Xs—

The Court: Are you talking about Plaintiff's Exhibit 1?

Mr. Barnard: Yes, for the record, Plaintiff's Exhibit 1.

Q. You stated that the Xs represented undamaged limbs, or major limbs which were undamaged, and that the various numbers from one to three represented the number of primary or scaffold limbs that were cut from each tree, is that correct?

A. Maybe I misunderstood the first part of your question.

The Court: Let's read it, Miss Schulke.

(Question read.)

The Court: Well, I think you better reframe that question, Mr. Barnard.

Mr. Barnard: Very well.

Q. It was your testimony, Mr. Grimm, was it not that the Xs represented trees in the Merrill Gem orchard that were undamaged insofar as major limbs were concerned? A. That is correct.

Q. And that the figure one represented trees in that [177] orchard from which you had had to cut one major limb? A. That is correct.

(Testimony of Charles William Grimm.)

Q. And likewise the figure two meant two major limbs had been cut? A. Yes.

Q. And that the figure three meant that three major limbs had been cut?

A. Yes, that is right.

Q. You testified also that the average number of major limbs was five? A. Yes.

Q. So that if you had had to cut all five major limbs you then classified the tree as a stump, and the letter S appears? A. Yes.

Q. I notice that on the diagram, Plaintiff's Exhibit 1, there were no trees from which you had to cut four major limbs? Is that true?

A. That is true, there is no four.

Q. Did it just happen that there were no trees with four, or did you cut the fourth—did you cut all the limbs off if four had been damaged and only one remained?

A. We didn't cut any limbs that were not dead.

Q. Very well. Now, Mr. Grimm, you filed your original complaint in this action on July 24th of 1957, did you not? [178]

A. I believe that is right.

Q. In the Superior Court in Kern County?

A. Yes, that is correct.

Q. And at that time you were familiar with the condition of your orchard, were you not?

A. Yes.

Q. And as a matter of fact, the damage was apparent? A. Yes, it was.

Q. The trees that were going to die had died?

(Testimony of Charles William Grimm.)

A. Well, I wouldn't say that.

Q. Well, did any limbs die after July?

A. Yes.

Q. They did. A. Yes.

Q. In other words—withdraw that. Did any entire trees die after July?

A. No, I don't believe so.

Q. Your original complaint was a verified complaint, was it not? A. Yes.

Q. And you swore to it as being true?

A. Yes.

Q. And in that complaint you alleged that out of 1090 trees in the Merrill Gem orchard 582 had been destroyed, is that correct? [179]

The Court: Well, I think if you have a copy of the complaint you should show it to the witness.

Q. (By Mr. Barnard): I will show you, Mr. Grimm, a copy of the original complaint and call your attention to paragraph 7.

A. This is probably not correct because we did not have 1090 trees in that orchard.

Q. But you did file this complaint alleging the existence of the 1090 trees? A. Yes.

Q. And alleging that 582 trees had been destroyed?

A. That is what it says there, all right.

Q. When did you finally count the trees in your orchard?

A. I believe that we actually took the count when I made this chart.

Q. And by this chart, you are referring to

(Testimony of Charles William Grimm.)

Plaintiff's Exhibit No. 1? A. Yes.

Q. When was that?

A. That was in late October, I think.

Q. Of 1957. A. '57.

Q. And at that time you discovered, did you, for the first time, that you only had 726 trees?

A. I—that reminded me that I had 726 trees.

Q. And in preparing the chart, Plaintiff's Exhibit 1, you testified that you went through your orchard tree by tree? A. Yes.

Q. So you discovered a total of 300 and—withdraw that. You discovered a total of 691 limbs had been cut?

A. I didn't take that count, I don't think.

Q. Well, you discovered the total of the limbs that show on this chart as having been cut?

A. Yes.

Q. And with 726 trees containing an average of five limbs per tree, there would be some 3,600 limbs on the trees? A. I didn't work it out.

Q. That is just mathematical.

A. Yes, mathematical.

Q. Now, in the spring of 1957, prior to the application of the spray material to your Merrill Gem trees, had you irrigated the Merrill Gem orchard?

A. Yes, we had.

Q. And when did that irrigation take place?

A. We planted a cover crop in October, and grew a cover crop during the winter, and we had irrigated the orchard about a week prior to spraying.

(Testimony of Charles William Grimm.)

Q. Was that the only irrigation, or had you irrigated it throughout the winter? [181]

A. We had irrigated throughout the winter.

Q. And the last irrigation then was approximately a week prior to spraying? A. Yes.

Q. Did you have any infestation or presence of any insects present in your orchard around March 1st, or shortly prior thereto?

A. We had evidence of deposits of mite eggs in the orchard. Tim Hanna reported to me that he found both parlatoria scale and San Jose scale, on the peach trees.

Q. Did you have any peach tree twig bore?

A. I had not detected any peach twig bore.

Q. Had you looked for it? A. Yes.

Q. Now, you testified that when Mr. Hanna suggested an application of the formula which was ultimately used that you objected to the use of four per cent oil? A. I did.

Q. Had you used oil before on your peach trees?

A. Never had used it.

Q. Had you used oil on any other trees?

A. No.

Q. Upon what information then did you object to four per cent of oil?

A. Well, I had spent 27 years in the department of [182] agriculture, and during that period of time I have seen some damage caused from excessive oil use.

Q. Do you know what kind of oil had been used in the instances in which you saw damage?

(Testimony of Charles William Grimm.)

A. No, I don't recall what types of oil they were.

Q. As a matter of fact, it is customary to use a heavy oil in the wintertime spraying, isn't it?

A. Yes, normally you use a heavier oil in the winter than you would in the summer.

Q. Now, is Kern County a peach growing area?

A. Kern County is a new peach growing area.

Q. About how long ago did it start?

A. The oldest orchard is only 15 years old.

Q. I see. And had they tried to grow peaches in Kern County at any time in the past?

A. Yes.

Q. Then the orchards that had been planted were then pulled out, is that correct?

A. Yes.

Q. What was the reason?

A. It was because they attempted to grow peaches on a peach root. Later on they developed new types of roots more resistant to nematodes, and from those roots we were able to establish orchards in lighter soil.

Q. In other words, it was with the development of a new [183] type of peach tree?

A. Well, both tree variety and root stock.

Q. How many orchards are there in Kern County at the present time, do you know, that is peach orchards?

A. Well, I don't know.

Q. It isn't a major crop in the area?

A. No, it is not.

Q. Now, on March 5th and 6th, at the time this

(Testimony of Charles William Grimm.)

spraying was done, can you tell me, first, the condition of the Gold Dust trees insofar as leafing and budding is concerned?

A. As best I remember, the Blazing Gold were farther advanced than the other two varieties, and there were a number of blossoms open the day we applied the material. The balance of them were in what I referred to as the popcorn stage, or where the buds had started to crack open.

Q. Can you give me an estimate of the percentage of the Gold Dust blossoms that were virtually out?

A. They were perhaps 50 to 60 per cent that were well along.

Q. In other words, of the buds on the Blazing Gold trees between 50 and 60 per cent were either in full blossom or at least partially open?

A. No, I didn't say in full blossom; they were cracked open.

Q. But they were not open? [184]

A. There were very few that were actually open. They were in the advanced pink bud stage.

Q. And what about the leaves?

A. The tips of the leaves were starting to show.

Q. Can you give me a percentage of the Gold Dust buds and blossoms out?

A. They are normally about three days behind the Blazing Gold, and I would roughly estimate maybe 30 or 40 per cent were in about the same stage as the Blazing Gold.

Q. And the Merrill Gems, can you estimate—

(Testimony of Charles William Grimm.)

A. The Merrill Gems were in pink bud.

Q. Were any of the blossoms opened?

A. In the what?

Q. In the Merrill Gems?

The Court: You mean any of the buds?

Q. (By Mr. Barnard): Any of the buds?

A. Yes, there were probably a few buds.

Q. Can you give me an estimate of the percentage?

A. Well, it was very small. You would find an occasional bud, or blossom open.

Q. Would you say there was approximately five per cent? A. That may be correct.

Q. Five per cent of the buds were opened?

A. Yes. [185]

Q. And the same percentage applied to the leaves?

A. Well, the leaves were not open in that sense. The leaf comes out after the fruit blossom opens, and the tips of the leaves, or the points of the leaves were visible.

Q. All right. Now, who applied the spray?

A. We did; my men did.

Q. Your own employees? A. Yes.

Q. And what type of spray rig was used?

A. We have a Hardy 600-gallon Hardy sprinker.

Q. Is that pulled behind the tractor?

A. Yes.

Q. And how many nozzles are on the rig?

(Testimony of Charles William Grimm.)

A. For spraying trees there are two, but we have other nozzles.

Q. In this spray operation that was used here two nozzles were used, is that correct?

A. That is correct.

Q. In other words, two men walked behind the rig and sprayed, one sprays to the right and one sprays to the left? A. That is right.

Q. Do you know what part of the orchard they started on?

A. Yes, we started on the southeast corner.

Q. Southeast corner. And then did you progress in a northerly direction, alternating the direction in each row? [186]

A. Yes, we started on the southeast corner and we didn't complete the first two rows. We had to fill the tank and we went back in the same rows, on the outside rows, and then came back the second and third row, until we used the material, and then we started back from the east again.

Q. Did you observe the spraying operation yourself? A. I helped put on part of it.

Q. And were you satisfied that a complete coverage was being obtained on each tree?

A. Yes, I was.

Q. In other words, the tree in the middle of the orchard would be sprayed first from one row on one side and then from the other row on the other, is that right?

A. I don't quite follow your question.

Q. Well, in other words, the men operating the

(Testimony of Charles William Grimm.)

spray did not walk around an individual tree?

A. Yes, they did.

Q. While the rig was going down the row they would walk about each tree?

A. They had 50-foot lead lines on the nozzle, the spray rig is pulled up and stopped and the men walk around the tree and spray the tree, and it is—complete tree at a time.

Q. And you are satisfied that a complete coverage was being obtained on each tree?

A. That is correct. [187]

Mr. Hamilton: Your Honor, I am going to object to this line of questioning, and going further with it, on this basis: I am under the impression that we have the stipulation that this spray was applied in the manner recommended by Cal-Spray. Therefore, I see no object to be gained by going into the mechanical operation of it. I do not want to unduly hamper counsel in his cross examination, but this certainly was not gone into on direct examination on the basis of the stipulation.

Mr. Barnard: I believe, if the Court please, that it was proper. However, I had finished that particular line.

The Court: As long as it is finished, I guess there is nothing for me to rule on.

Mr. Hamilton: The objection is withdrawn.

Q. (By Mr. Barnard): Now, Mr. Grimm, approximately how long was it after the spraying was completed on March 6th before you noticed anything unusual in your orchard?

(Testimony of Charles William Grimm.)

A. It was about a week, the best I remember.

Q. And what was the first thing that you noticed?

A. I observed that in the Blazing Gold there seemed to be a burning of the blossoms that were open, the pistils at the end of the fruit had begun to dry and curl; most of the fruit, or some of the fruit—I shouldn't say much of the fruit, but some of the fruit was beginning to shatter. [188]

Q. To what? A. Shatter, fall off.

Q. In other words, in the week between March 5th and 6th, and the time that you noticed this condition, some of the blossoms had turned into fruit? Is that right?

A. No, not the fruit itself. When the blossom opens the pistil is present with the blossom, and they began to show a burning or drying, dessication, and the blossoms began to drop.

Q. That is what you meant when you said some of them began to drop? A. Yes.

Q. You didn't mean the fruit?

A. No, the fruit had not yet formed.

Q. All right. Now, at that time had all of the blossoms on the Blazing Gold come out?

A. No, not all of them.

Q. Did those which had not come out later come out in the normal manner? A. Yes.

Q. And did they continue to develop leaves and—that is, blossoms develop fruit? A. Yes.

Q. Did the leaves which were not opened on March 5th and 6th then open in a normal manner?

(Testimony of Charles William Grimm.)

A. Yes.

Mr. Hamilton: May I inquire whether we are still talking about the Blazing Gold?

Mr. Barnard: Yes.

The Court: That is my understanding of it.

A. They did develop in a normal manner.

Q. (By Mr. Barnard): Then I believe you testified that after a short period of time this condition seemed to disappear from the Blazing Gold trees?

A. Yes.

Q. From then on they developed in a normal manner? A. Yes.

Q. And they produced a normal crop?

A. Yes.

Q. Now, approximately how long was it after you first noticed this condition in the Blazing Gold trees before it had all cleared up?

A. Well, it was a couple of weeks that there was some evidence of it.

Q. In other words, then, in approximately three weeks after the spraying had been completed the Gold Dust trees were growing in a normal manner?

A. Are we talking about the Gold Dust, or Blazing Gold?

Q. I beg your pardon, Blazing Gold. [190]

A. Yes, that is correct.

Q. And they continued so the rest of the season?

A. Yes.

Q. Now, the Gold Dust trees, Mr. Grimm, did you ever notice anything unusual in that part of the orchard?

(Testimony of Charles William Grimm.)

A. There were two trees that showed the same symptoms as we found in the Merrill Gems.

Q. When did that condition first appear?

A. We didn't notice that until probably about the time that the Merrill Gems began to show symptoms.

Q. And did that condition appear in any other trees in the Gold Dust at a later time?

A. No, those two continued to show symptoms most of the summer.

Q. But it didn't appear in any other trees?

A. No, except in the bud blossoms as in the Blazing Gold.

Q. In other words, do I understand that the Gold Dust trees exhibited the same condition as far as the blossoms which were opened?

A. We could find some evidence of burning.

Q. In the blossoms? A. In the blossoms.

Q. Yes. But the blossoms which were not opened when the spraying took place then opened in a normal manner? A. They seemed to. [191]

Q. And the leaves which were not out then came out in a normal manner?

A. Well, all of the leaves came out in a normal manner.

Q. And with the exception of the two trees that you have mentioned that exhibited somewhat the same symptoms as the Merrill Gems, all of the balance of the Gold Dusts developed normally throughout the rest of the year? A. That is correct.

Q. And they produced a normal crop?

(Testimony of Charles William Grimm.)

A. Yes.

Q. Did the two trees which were affected in a manner similar to the Merrill Gems produce a crop?

A. On about a fourth of the tree they did not produce a crop.

Q. In other words, about three-fourths of the tree was normal? A. Yes.

Q. Did any of the limbs die on those two trees?

A. Some of the small twigs, but no primary limbs died.

Q. Where were those trees located in your Gold Dust orchard? A. Near the northwest corner.

Q. The northwest corner of the Gold Dust orchard? A. Yes.

Q. And how many rows of Gold Dust do you have, do you [192] remember as to that?

A. I think 12 or 13 rows, 14.

Q. So they would be separated from the Merrill Gem trees by some ten or twelve rows?

A. That is correct.

Q. In other words, they were not contiguous?

A. No.

Q. Now, when was the first time that you noticed something in the Merrill Gems?

A. It was,—I believe Tim Hanna called my attention to it. It was a tree near the road, near our driveway and he thought it was a fertilizer deficiency.

The Court: I think the question was, Mr. Grimm, when did you notice it. When?

The Witness: Oh, when. Thank you. It was

(Testimony of Charles William Grimm.)

about the time that we were watching these blossoms and the possible injury to those—to the other varieties of fruit.

Q. (By Mr. Barnard): In other words, some time approximately one week after the spraying, but less than three weeks?

A. I would say that is near correct.

Q. Did you then go out into the orchard with Mr. Hanna? A. Yes.

Q. And examine this tree? A. Yes. [193]

Q. What was its condition when you first examined it?

A. It looked very yellow and sickly, and he suggested that we put a leaf feed on it to see if we couldn't revive it.

Q. And as a matter of fact, he brought you out a bag of leaf feed? A. Yes.

Q. But you didn't apply it?

A. We didn't apply it.

Q. How long after you noticed this first tree did you notice the condition in some of the other trees?

A. It was within a few days.

Q. And then did it gradually spread throughout the orchard? A. Yes, it did.

Q. In other words, it didn't come out in all trees on the same day? A. No.

Q. First you noticed it in one tree, a few days later there might have been ten or fifteen trees?

A. Yes, that is correct.

Q. And then a few days later another ten or twenty? Is that the way it happened?

(Testimony of Charles William Grimm.)

A. Well, it also happened you would see a small spot on one tree, and you would find another spot on another tree, and then it began to progressively get worse. [194]

Q. But it did not happen all at once?

A. No.

Q. But it got progressively worse?

A. It did get progressively worse.

Q. For how long a period of time did the orchard continue to get progressively worse?

A. Well, for about, I would say probably about a month, a month's time.

Q. In other words, that would be for a period of time approximately six weeks after the spraying?

A. It could be, a month or six weeks.

Q. From the time it started?

A. From the time it started.

Q. From the time you first noticed it which was a little more than a week after the spraying, is that correct?

The Court: You will have to speak audibly, Mr. Grimm?

A. Yes, that is correct.

Q. (By Mr. Barnard): Now, I am not trying to tie you down to six weeks exactly, don't misunderstand me. Six or eight, or something like that?

A. It's within that period of time.

Q. For a period of six or eight weeks, or somewhere in that neighborhood, the trees got progressively worse? A. Yes, that is correct. [195]

Q. And then what happened?

(Testimony of Charles William Grimm.)

A. They seemed to stand still.

Q. In other words, the condition didn't get worse, but it didn't get better?

A. That is right. They stood still for, well, I believe until June or July, we began to see some new growth on some of them.

Q. All right. Then for whatever period it is until some time in June or July they stood still. Then would you say they started to improve?

A. Yes, they did.

Q. None of the limbs which had actually died came back? A. No.

Q. But new shoots came up?

A. That is correct.

Q. Where did they come from?

A. They came from all parts of the tree.

Q. From all parts of the tree?

A. Yes, except the dead areas, of course.

Q. Naturally. Did the condition of the trees then gradually improve from then on through the balance of the growing year?

A. Yes, they improved progressively.

Q. Until in September, or approximately September, at a casual observation the orchard looked fairly normal, didn't it? [196]

A. Yes, the new growth had masked over the deadwood and the leaves had dropped over and they were pretty well concealed.

Q. The dead limbs were still there?

A. Yes.

Q. And they were not cut off until October, but

(Testimony of Charles William Grimm.)

the trees had leafed out enough it was pretty well masked? A. That is right.

Q. Now, going back to when the condition was at its worst, Mr. Grimm, what did you see on a visual observation of your trees?

A. I saw the south side devoid of foliage in most cases. From the tip to the trunk, and in some cases the trunk, the bark, cambium, had died, and in many cases the dead bark was on the south or—I might say the lower portion of the limbs, the top of which would still be green, and growing branches and foliage. The fruit that was on the limbs some completed to maturity, and on the same limb you would have all sizes of fruit from—anything from the size of a peanut to the size of a golf ball, and they hung there all winter—all summer and up into the winter. They would not develop.

Q. Had you finished?

A. I think that just about covers it.

Q. In examining your trees, did you find the cambium layer, when you peeled the bark, was dark? [196-A]

A. Yes, it was discolored.

Q. And did you find that on portions of the trees, of the trunks and the limbs there was oozing juice? A. No.

Q. You didn't find any of that? A. No.

Q. Did you find that when you peeled the bark it had a sour smell?

A. I couldn't detect that.

Q. You couldn't? A. No.

(Testimony of Charles William Grimm.)

Mr. Barnard: Pardon me, your Honor. I thought I had the page number and I apparently didn't.

Q. Mr. Grimm, do you recall that your deposition was taken in this action on December 13th—

A. Yes.

Q. —1957? May I have the original?

I will hand you the original of that deposition, Mr. Grimm, and ask you to read on page 56, read to yourself, on page 56, commencing with line 17, running through to page 57 and through line 3—or through line 6.

A. According to this I did smell it.

Q. Have you finished reading it, Mr. Grimm?

A. I read down to line 25.

Q. Read down to what? [197]

A. To line 25.

Q. Then over on page 57, through line 6.

A. If I did I had forgotten it because I couldn't—I didn't remember the smell.

Q. May I ask you again, you remember the taking of your deposition? A. Yes, I do.

Q. And at that time were these questions asked you and these answers given by you:

“Q. From your investigation while observing these trees closely after you discovered this condition did you notice any sour smell when you cut through the bark? “A. Yes.

“Q. Was that rather prevalent throughout the entire orchard?

“A. Any of the limbs which had the cambium layer damaged released a sour smell.

(Testimony of Charles William Grimm.)

“Q. Was that same cambium layer darker than usual? “A. Very much so.

“Q. Was that condition common throughout the entire orchard?

“A. Yes, wherever the condition existed.

“Q. But where the condition did not exist and where the limbs or trees were seemingly unaffected then [198] the cambium layer was normal?

“A. Yes.”

Were those questions asked you, and did you give those answers?

A. Yes, that is correct.

Q. Now, Mr. Grimm, referring to Plaintiff's Exhibit 2, which is the invoice for the purchase of part of the material, there appears on that document the notation “for experimental sale.”

A. Yes.

Q. And you testified that nothing had been said to you about any experiments?

A. That is correct.

Q. Do you know what that term means on that invoice?

A. You mean the term “experimental sale”?

Q. For experimental sale?

A. No, I don't know what it means.

Q. Now, referring to Plaintiff's Exhibit 5 through 9, which I believe are the colored pictures, are they not? You recall these are the colored pictures of your orchard? A. Yes.

Q. Did I understand you to mean that these pic-

(Testimony of Charles William Grimm.)

tures were progressive from April through the middle of July, and showed the condition of the orchard at various times, or were they all taken on the same day?

A. They were all taken on the same day. [199]

Q. They were taken then in July?

A. As best I remember it was about that time.

Q. I see. And on these pictures you can see, can you not, the fruit which has remained on the branches? A. Yes, that is correct.

Q. In other words, the little dark spots you see are undeveloped peaches?

A. Yes, there is fruit on some of these trees.

The Court: Mr. Grimm, will you speak up loudly.

A. There seems to be fruit on some of these trees. It might indicate that these pictures were taken prior to July.

Q. (By Mr. Barnard): And in fact one of the pictures shows considerable fruit that can actually be recognized as peach, does it not? A. Yes.

Q. That is where the man is picking them.

A. Yes, that is correct.

Q. What I was referring to first, Mr. Grimm, these little dark spots——

A. Those are fruit.

Q. ——that appear on the branches that have no foliage on them are the undeveloped peaches that you were referring to? A. Yes.

Q. As a matter of fact, your Merrill Gems were picked before July, weren't they? [200]

(Testimony of Charles William Grimm.)

A. Yes, they were picked, we started picking on June 4th, actually.

Q. And when did you complete the picking?

A. Our last shipment was on June 11th.

Q. So at least one picture which shows the peaches on the tree must have been taken during that time?

A. I would say it was taken prior to that time.

Q. Prior to June 11th?

A. I would say that.

Q. And all the pictures were taken at the same time? A. Yes.

Q. Now, the other pictures that have been introduced in evidence, Mr. Grimm, as Plaintiff's Exhibit 10, do you remember the set of 16 pictures?

A. Yes.

Q. 10-A and 10-B being pictures of normal trees? A. Yes.

Q. The rest show the cutting that was necessary. A. Yes.

Q. Those pictures show foliage on those trees, do they not?

The Court: Show the witness the exhibit. Mr. Grimm, note the Clerk's mark 10-A will designate it. You see the Clerk's mark on there?

The Witness: Yes. [201]

Q. (By Mr. Barnard): Here is 10-A and 10-B, and those are his notations. A. Yes.

The Court: Did you have a question, Mr. Barnard?

(Testimony of Charles William Grimm.)

Q. (By Mr. Barnard): I asked Mr. Grimm if those pictures didn't show foliage on the trees.

A. Yes, that is correct.

Q. And was it your testimony that those pictures were taken in December or January, that is December of 1957 or January of 1958?

A. These pictures were taken quite recently. If I could have the folder these originated in I could get you the exact date on them. These were taken this year, I believe.

This was the last group of pictures that I took, and they were developed on March 24th, and I took them just a few days before. This other group was the ones I took in——

Q. And they were developed on March 24th?

The Court: Let's be sure we understand Mr. Grimm's statement. Certain pictures were developed March 24th?

The Witness: Yes, that is this group of pictures.

The Court: What group is that? Is that the 10?

The Witness: Yes.

Mr. Barnard: That is Plaintiff's Exhibit 10, Mr. Grimm.

The Witness: Yes. [202]

The Court: All right. Now, you said the "other group," I don't know which ones you were referring to?

The Witness: The small Kodak pictures were taken shortly after and during pruning time.

(Testimony of Charles William Grimm.)

Mr. Barnard: Are you referring to Plaintiff's Exhibit 11?

The Witness: Yes. They were taken during pruning time, or about the——

The Court: I think you will have to speak louder, Mr. Grimm.

The Witness: They were taken during pruning time.

Q. (By Mr. Barnard): Now, you stated, Mr. Grimm, that the pictures represented in Plaintiff's Exhibit 10 were developed on March 24th. That leaves one gap. Did you have them developed as soon as you took them? A. Yes, I did.

The Court: That is this year, 1958?

The Witness: This year.

Q. (By Mr. Barnard): So it is your testimony now then that Plaintiff's Exhibit 10, consisting of a group of pictures—— A. Yes.

Q. ——was taken in March of 1958?

A. That is correct.

Q. And they are pictures of your orchard?

A. Yes.

Q. Plaintiff's Exhibit 11, which is also a group of pictures and which are the colored ones, were taken around pruning time of 1957, which would be in the fall?

A. Sometime during the winter.

Q. Sometime during the winter. Now, what about Plaintiff's Exhibit 10-A, Mr. Grimm, and 10-B and 10-C.

(Testimony of Charles William Grimm.)

A. These were taken at the same time as this other series of 10 were taken.

Q. In other words, all of Plaintiff's Exhibit 10 were taken at the same time? A. Yes.

Q. And that was in March of this year?

A. Yes.

Q. So that the pictures in Plaintiff's Exhibit 10 show the condition of the foliage as it now exists, or as it existed in March of this year?

A. Yes.

Q. And not as it existed at any time in 1957?

A. That is correct.

Q. Now, in 1957 you produced 1756 boxes of Merrill Gem peaches, is that correct?

A. That is correct.

Q. I believe at one time you used the word "lug"; do you use those two words interchangeably? [204] A. Yes.

Q. In other words, whenever you refer to a lug or box you mean the same thing? A. Yes.

Q. What size is that?

A. That is a regular L.A. lug, two layer pack; what we commonly refer to as L.A. lug.

Q. Two layers of peaches in it, and approximately how much does it weigh?

A. From 17 to 20 pounds, depending on the size, net.

Q. Do you know how many lugs or boxes of Merrill Gem peaches you produced in 1956?

A. Yes, I produced 1423 lugs.

(Testimony of Charles William Grimm.)

Q. 1423. Now, you testified that it cost you \$484.50 to cut away the dead wood.

A. And to haul it out.

Q. And to haul it out. You testified that in order to do this you bought a pneumatic saw?

A. Yes.

Q. Was the price of the saw included in the \$484.50? A. Yes, it was.

Q. You still have the saw? A. Yes.

Q. And it is still in working order?

A. Yes. [205]

Q. Now, your estimate of the fair market value of your orchard prior to 1957 was \$2,250?

A. Yes, I believe that is about right.

Q. And your estimate of the fair market value afterwards was \$1,550. I just want to be sure. Is that your opinion of the value after all of the trees have grown back to full growth?

A. Yes, I believe that would be the difference that I would lose if I attempted to sell that orchard four years from now, five years from now, as of today's value.

Q. I am not sure I understood.

A. What I mean to say is that I would be penalized in a market, I believe, about \$700 an acre at any time that I would attempt to move that orchard.

Q. You mean if you tried to sell it today, or next year, or if you tried to sell it five years from now?

(Testimony of Charles William Grimm.)

A. There is a certain permanent damage affixed to the orchard that will never recover, I believe.

Q. And that in your opinion is approximately \$700 an acre?

A. I believe that would be near correct.

Mr. Barnard: If the Court please, I believe that I have finished with Mr. Grimm almost, if I might have just a few minutes to check over my notes.

The Court: How long do you think it will take, Mr. Barnard? [206]

Mr. Barnard: Oh, three, four or five minutes.

The Court: Well, we will take a very short recess then. Members of the jury, keep in mind the admonition I have given you. We will take a short recess.

(Short recess.)

The Court: The jury is present, gentlemen?

Mr. Hamilton: So stipulated.

Mr. Barnard: Mr. Grimm, I have just one more question:

Q. Can you estimate for me the length of time that elapsed between the time that you noticed the first Merrill Gem tree, or the condition of the first Merrill Gem tree to be something wrong, and the time that the last tree got sick later on?

A. Well, it was perhaps a month or six weeks that the whole orchard seemed to deteriorate, and some of those trees are still showing signs of deterioration. I found a new limb just recently that had died from the tip down, on one tree.

Q. Died in 1958?

(Testimony of Charles William Grimm.)

A. It died after we pruned it, in probably December of this year.

Q. Have your trees been sprayed with an oil spray since March 6, 1957?

A. They have not.

Q. All right. Now, I think you misunderstood my first [207] question. I realize you have already testified as to how long the condition existed, and you testified it started with one tree, and as days went on you noticed more and more and more trees. Can you estimate for me the length of time that elapsed between the date you saw the first tree and the date that finally the last tree got sick that did get sick? The condition of course remained in the trees for a long period of time. Do you understand my question?

A. Yes, I think I understand the question. We began to watch that first tree, and suddenly we began to see the symptoms on many trees, and it seemed that overnight the whole, or most of the orchard collapsed, and it stayed—it continued to collapse for a period of a month or more, and then it seemed to stay in about that position, and then began to recover.

Q. Did the condition show up in any given tree a month later for the first time?

A. No, there were symptoms on most—well, I would say that most of the trees showed symptoms early and continued to develop more symptoms as time progressed.

Q. Then what I am trying to get is when was

(Testimony of Charles William Grimm.)

the last time that a tree showed symptoms for the first time?

A. Oh, I don't know that I can answer that question. I believe that the injury was within a relatively short period; in other words, with a week or ten days all the trees [208] that became affected seemed to become affected.

Q. Within a week or ten days after you noticed the first tree it had spread to all that it was ever going to spread to?

A. I believe that is right.

Mr. Barnard: I have no further questions.

The Court: I think, gentlemen, we will recess for the night now.

Mr. Hamilton: Very well.

(Admonition to the jury, and recess at 4:15 p.m., to 9:30 a.m., April 10, 1958.) [209]

Thursday, April 10, 1958, 9:30 a.m.

The Court: Do counsel stipulate the presence of the jury?

Mr. Hamilton: So stipulated.

Mr. Barnard: So stipulated.

CHARLES W. GRIMM

the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Mr. Hamilton: Counsel, had you finished your cross?

Mr. Barnard: Yes.

(Testimony of Charles William Grimm.)

Redirect Examination

Q. (By Mr. Hamilton): Mr. Grimm, on cross examination yesterday it was brought out that part of the expense that you gave to me as the cost of removing the dead wood from your orchard, hauling it out, stacking it and burning it, was a pneumatic power saw, and I believe you stated that the saw cost \$225, is that the correct figure?

A. That is correct.

Q. And you still have that saw?

A. Yes, sir.

Q. Did you purchase that saw solely and exclusively because of the amount of work necessary in removing the timber from the orchard?

A. Yes, sir. [212]

Q. Do you have any further use for it?

A. Not immediately, at least.

Q. You may at some future time have some use for it? A. It may be.

Mr. Hamilton: Mr. Grimm,—and counsel, this I think should have been covered on first direct examination, but I will ask it now with your leave:

Q. Your ordinary expenses of caring for your orchard, such as annual irrigation, fertilization, the ordinary spraying programs, will those expenses be any greater, or any lesser, by reason of the present condition of your orchard?

A. Well, I would expect that I would probably have to use a good deal more fertilizer to increase the growth of the trees, and I am sure that I will have a pruning expense additional over what would

(Testimony of Charles William Grimm.)

be considered normal. As far as irrigation, I don't think that I would probably have any additional expense in that.

Q. Do you have, sir, any estimation of the additional expense of fertilization that will accrue to you by reason of injury to your orchard?

A. Well, that would be entirely speculative. I would have to see the results of the growth to determine whether or not they will actually need fertilization.

Q. In other words, as you sit there now it would be [213] entirely a guess?

A. Yes, it would be a guess.

Q. Then, for the purposes of your contention concerning damages, can we conclude that so far as the ordinary expenses of taking care of your Merrill Gem peach orchard, as they heretofore existed annually and will hereafter exist annually, will be the same?

A. I think that might be concluded.

Q. Mr. Grimm, on cross examination it was pointed out to you that when your deposition was taken you indicated at some time or another you detected the presence of a sour odor, and you stated on the witness stand in court on direct examination—pardon me, I believe on cross examination, that you did not detect any sour odor. There is an inconsistency. Do you have any explanation for that apparent inconsistency?

A. I believe so. When I gave my deposition I used the word "sour", and I probably misused the

(Testimony of Charles William Grimm.)

word as being descriptive of what I really meant. At the time the investigation was going on, with the men that we had from the various departments, the question often arose and always arose as to whether or not a smell was detectable, and at that time I couldn't smell it. But later in the summer it seemed I could detect an odor of some sort, and when we finally cut those large limbs with that power saw you [214] could very definitely get an odor, which, if I had a choice of words now, I would say was more of a fermentation smell than a sour smell.

Mr. Hamilton: I have no further questions.

Recross Examination

Q. (By Mr. Barnard): Mr. Grimm, I have just one question. You recall again when we took your deposition? A. Yes.

Q. Do you recall the testimony that I read to you yesterday concerning that? A. Yes.

Q. You will recall that the question I asked was directed to the time that this condition first arose, and the time that you were examining these trees carefully, and not to the fall, isn't that true?

A. The times that we were examining these carefully was quite late in the spring or early summer.

Q. In other words, when the condition first came about in your orchard, you didn't pay much attention to it, is that what you mean?

(Testimony of Charles William Grimm.)

A. No, I mean that when the damage first occurred I could not detect any odor at all.

Q. But you did examine your orchard carefully and watch it day by day, from the first minute this condition [215] existed?

A. Well, I wouldn't say day by day; every occasion that we could.

Q. Every time you could get out there, you did, right? A. Yes.

Q. And you testified on direct examination that you and Mr. Hanna both looked at it carefully?

A. Yes.

Q. And you watched this condition exist?

A. That is right.

Q. And you were trying to figure out what was wrong? A. Yes.

Q. All right. Now, I ask you again, do you want to see the original?

A. No, I think I remember.

Q. I ask you again if you remember in the taking of your deposition these questions were asked:

“Q. From your investigation while observing these trees closely after you discovered this condition did you notice any sour smell when you cut through the bark? “A. Yes.”

Now, that question was asked, wasn't it?

The Court: I think there is no question, Mr. Grimm stated yesterday the questions which you read to him were [216] asked, and he gave the answers. Is that right, Mr. Grimm?

The Witness: Yes, sir.

(Testimony of Charles William Grimm.)

Q. (By Mr. Barnard): And is it your testimony now that in answering "yes" to that question you were thinking of some time later?

A. That is correct.

Mr. Barnard: Very well. That is all.

(Witness excused.)

The Court: Next witness?

Mr. Hamilton: We will call Grant Merrill.

GRANT MERRILL

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Grant Merrill.

The Clerk: Have that seat.

Direct Examination

Q. (By Mr. Hamilton): Your name is Grant Merrill, is that correct? A. That is right.

Q. Mr. Merrill, where do you reside?

A. My home is in Red Bluff, California.

Q. What is your business or occupation, sir?

A. I am a peach grower and shipper and plant breeder.

Q. You are, are you not, the father of the Merrill Gem [217] peach?

A. I originated that variety, yes.

Q. How long have you been in that business, the business of raising peaches, business of breeding varieties of peach trees?

A. Well, I planted my first peach orchard in 1928, and we started our first work on breeding

(Testimony of Grant Merrill.)

new varieties of peaches and nectarines about 1930.

Q. In other words, you have been in that business for 28 to 30 years? A. That is right.

Q. How much peach orchard do you have under your personal direction and control? How many acres?

A. Well, we have 95 acres, plot in Red Bluff, that is either in commercial orchard or in experimental work breeding peaches and other fruits. All the 95 acres is in except for a few walnuts, and building sites. Then we have another 44 acres there. Then we have 60 acres at Bakersfield, and then we have a new planting of 150 acres under lease in the orchard at Bakersfield.

Q. The only two areas in which you have peach orchards then is in the Red Bluff area and in the Bakerfield area? A. That is right.

Q. Mr. Merrill, your orchard in the Bakersfield area, how far is it from the Grimm Merrill Gem peach orchard? [218]

A. Oh, I guess it is a little better than ten miles, 10 or 12 would be my estimate.

Q. Is that orchard of yours all Merrill Gems?

A. No, only a portion of it.

Q. In your 30 years of working with peaches, Mr. Merrill, have you observed and know the figures on sales of peach orchards over that period of time?

A. Oh, more or less; I think as you observe in your business and talk to neighbors and other qualified people.

(Testimony of Grant Merrill.)

Q. You have yourself started and brought to production peach orchards, have you not?

A. Oh, yes.

Q. You know the cost and expense of bringing a peach orchard into full production?

A. That is right.

Q. Mr. Merrill, do you have an opinion on—strike that, please. Mr. Merrill, have you been in the Charles Grimm Merrill Gem peach orchard?

A. Yes.

Q. Have you been in that peach orchard prior to March 4, of 1957? A. Yes.

Q. Have you been in that orchard since March 5th of 1957? A. Yes. [219]

Q. Mr. Merrill, do you have an opinion on the fair market value of the Charles Grimm peach orchard on March 4, of 1957?

A. Well, it's pretty hard to determine——

The Court: The question calls for a yes or no answer.

The Witness: Oh. What was the question again?

Q. (By Mr. Hamilton): Do you have an opinion on the fair market value of the Charles Grimm peach orchard on March 4, 1957?

A. I have some ideas, yes, sir.

Q. What is that opinion?

The Court: I think I would like to ask the witness some questions.

Mr. Hamilton: Certainly.

The Court: Mr. Merrill, what is your understanding of the term "fair market value"?

(Testimony of Grant Merrill.)

The Witness: Well, it is what I might sell for or others might buy from me, under normal trading conditions, nothing forced about it. That is about what I would call fair market value.

The Court: Well, it is what a willing seller would sell for, and a willing buyer would pay for, in the open market——

The Witness: Yes.

The Court: ——neither acting under any compulsion, and [220] each being fully informed as to all of the uses to which a piece of property has been adapted, or is adaptable. It isn't what you would sell for, what I would sell for; it is what a willing buyer and a willing seller might arrive at through negotiations in the open market. Now, that is, I think, the definition that you should have in mind.

Are you a real estate broker?

The Witness: No, sir.

The Court: Not a salesman?

The Witness: No.

The Court: Have you bought or sold any real property in Kern County?

The Witness: Just bare property without any orchard on.

The Court: Have you kept informed as to the sales of peach orchards in that area?

The Witness: As far as I know there has been none sold in Kern County. There has been some orchards sold in Fresno County I know about.

(Testimony of Grant Merrill.)

The Court: I have no further questions.

Q. (By Mr. Hamilton): Bearing in mind, Mr. Merrill, what Judge Jertberg has told you, would you now, basing your opinion upon that, give us your opinion as to the fair market value of Mr. Grimm's orchard on March 4, 1957?

Mr. Barnard: If the Court please, in view of the [221] witness' answers to your Honor's questions, I would object on the ground a proper foundation has not been laid. The witness has stated that he knows of no sales of orchards in Kern County.

The Court: I think I will have to sustain that objection, Mr. Hamilton, on the ground of lack of foundation.

Mr. Hamilton: Your Honor, on that particular situation, it has been brought forth in evidence that peaches are of comparatively recent vintage in Kern County. The Court would not leave us in a position where it would be impossible by a man of 30 years experience to fix his opinion of a fair market value by reason of the fact there have been no sales, a commodity that in that area is so relatively new that an historical market has not developed. Mr. Merrill has stated that he knows, and has purchased bare land; that he knows the cost of producing an orchard from the root stock stage to full production, and while there may be an absence of sales, it seems to me that we are entitled to have his opinion; that the fact it was not based on any sales in Kern County may go to

(Testimony of Grant Merrill.)

the weight of that, rather than excluding his opinion entirely.

The Court: Well, I believe, Mr. Hamilton, that fair market value means about what the definition says, it is what the market reflects. Now, I agree that if there are no sales from which the market can be determined, that fair [222] market value may be arrived at by other means. But I don't think you have laid the foundation for that.

Q. (By Mr. Hamilton): Mr. Merrill, when was the Merrill Gem peach first observed by you?

A. In 1942 the seedling that later became the Merrill Gem was first observed to fruit.

Q. And when was the Merrill Gem first planted commercially?

A. Well, I planted the first trees myself in 1944.

Q. In 1944. A. February 1944.

Q. Where were those trees planted?

A. In Kern County, on my property I now own.

Q. Now, have you, sir, continued to plant Merrill Gems on any property, additional trees from time to time? A. Yes.

Q. I take it as a matter of mathematics—strike that, if you would. Of your original 1944 planting, Mr. Merrill, are there any left?

A. Yes, some of them.

Q. Then the oldest producing Merrill Gem peach trees would be 14 years old?

A. That is right, this February.

Q. That would be going into, as you would express it, [223] their fifteenth leaf?

(Testimony of Grant Merrill.)

A. That is right.

Q. Do you recall how many acres there were in that original planting?

A. There are about ten acres.

Q. What is the size of your Merrill Gem orchard in Kern County at the present time?

A. Well, this particular farm has 22 acres on it, and the other farm newly planted has ten acres.

The Court: You mean, both in Bakersfield?

The Witness: Both in Kern County.

The Court: Kern County, yes.

Q. (By Mr. Hamilton): By the other farm, you refer to the 150 acres you had on a lease basis?

A. That is right.

Q. Mr. Merrill, from your experience in the peach business, and your observation of the Merrill Gems, what is its productive life span?

A. Well, I think under normal good growing condition I would think the tree would last around 30, 35 years.

Q. When, sir, does a Merrill Gem peach come into maximum production?

A. About the sixth or seventh leaf.

Q. Have you had on many occasions had Merrill Gems [224] planted and brought to bearing through their fifth leaf? A. Yes.

Q. From your experience what production can be expected from a Merrill Gem, in normal health and vigor, in good condition, in the year of its fifth leaf?

A. Well, it wouldn't be full production yet. I

(Testimony of Grant Merrill.)

would say somewhere between four and eight tons to the acre.

Q. Four and eight tons, or four and eight lugs—excuse me.

A. It would be four and eight tons, 400 to 800 lugs per acre, either one would be approximately correct.

Q. Can you reduce that to production per tree?

A. It would be approximately four to eight lugs per tree.

Q. Four to eight lugs per tree. Sir, in comparison with other varieties, of approximately the same harvest date, is the Merrill Gem a desirable peach on the open market?

A. It has brought the highest price of any peach at any time of the year on an average of a year.

Q. Does it ship well? A. Very well.

Q. In the Bakersfield area, when annually is the average annual harvest date?

A. In Kern County?

Q. Yes. [225]

A. Well, it will start on early seasons in early districts the last week in May, and in later districts and in later years it will run up to the second week in June, starting harvest.

Q. In other words, it is late May and early June? A. That is right.

Q. Mr. Merrill, do you keep records of your Merrill Gem peach production? A. Yes.

(Testimony of Grant Merrill.)

Q. As a matter of fact, those are rather elaborate records, are they not?

A. We keep very careful records.

Q. As a matter of fact, you keep a record in which you can even give the average number of peaches per tree harvested each year, is that correct?

A. That is right.

Q. Did you, Mr. Merrill, at my request go back through your records, and using those Merrill Gem peach trees in Bakersfield that were at the time the figures were taken at maximum production, in other words, in their sixth leaf or over, compile your production records for me?

A. I have to qualify the answer in two ways. My secretary and I both went over the figures, and then we did not compile the figures off only the old trees. We added in the younger trees, and it is my custom to go through [226] the orchard each two or three years and take the trees that are half in bearing, and give them a half score; those that are a quarter bearing, give them a quarter score, and so on, and add that up and determine what the total number of equivalent mature trees these are. We have to do that because we have had severe nemetoid damage in that orchard before we had to change roots, and even some since then, and also it was an experimental orchard, developing these new varieties, and we changed over some of the varieties, starting with ten acres of Gems and we now have 22, we gradually changed them over, so that at various times we had various age

(Testimony of Grant Merrill.)

trees. And for my own information, in order to determine what was the production per tree and make a study of my costs, and so on, we used the proportions of various ages of trees for my own information, to try to determine what our costs were, and production factor, and so on. So it wasn't just the five year olds or older, it was the proportion of mature trees we used.

Q. And are those figures, those proportional factors, put into those records at the time that tree was in production?

A. We went through the records, usually in the wintertime when the tree is most easily observed without leaves and growing conditions, and we usually make it at that time, sometimes in the fall when some of the leaves are still on. [227]

Q. But that factor is put into your records and preserved by you, and was used by you in compiling this historic production for me, is that correct?

A. We compiled it at the time, and put down the figures in our book, and after we compiled it, we didn't keep it any more. In other words, each year, or every other year, or at regular intervals, we get a proportion allowing for growth, and we try to get what we consider as a basis for our own information.

Q. And you and your secretary, you say, both worked on these figures? A. That is correct.

Q. There were some records preserved by you at the Bakersfield office kept at your home office in Red Bluff, is that correct?

(Testimony of Grant Merrill.)

A. The records were kept at Red Bluff.

Q. And such work as your secretary may have done was under your supervision?

A. That is correct.

Q. From records under your control?

A. Right.

The Court: Mr. Hamilton, let me interrupt for a moment.

(Other court matter.)

The Court: All right, I think we can go ahead.

Mr. Hamilton: Thank you, your Honor. [228]

Q. Mr. Merrill, do you have with you a copy or the original of the production records which you delivered to me? A. Yes, I have.

Q. In 1951, sir, how many Merrill Gem peach trees did you have in full production?

Mr. Barnard: Now, if the Court please, may I interpose an objection to the question, and to all questions directed towards this survey, on the ground that the answers given by Mr. Merrill as to how it was prepared show that it was not based on production of a given group of trees of a certain age, but was based on a composite which is dependent entirely on Mr. Merrill's opinion as to whether he gave a tree half credit, a third credit, or full credit, and so on. Therefore, it is not competent evidence of the productivity of a given tree or a given acre.

The Court: Are you talking, Mr. Merrill, about Gem peaches in the Bakersfield, or Kern County area?

(Testimony of Grant Merrill.)

The Witness: That is right, Merrill Gems.

The Court: In Kern County?

The Witness: That is right.

The Court: Now, confine yourself first to 1951, first, Mr. Merrill. Explain again to me exactly how you made this survey with respect to 1951.

The Witness: Well, it happens in the year 1951 there was no survey necessary because in that particular year [229] the trees were all in full bearing that we had records on. Some of the years we had to proportion but not 1951.

The Court: In 1951 you have a survey of the actual production from a given number of Gem peach trees in Kern County, is that right?

The Witness: That is right.

The Court: Well, I am going to overrule the objection as to 1951.

Mr. Hamilton: Thank you, your Honor.

The Court: Read the question, Miss Schulke.

(Question read.)

The Court: I am confining it now to Kern County.

Q. (By Mr. Hamilton): All of the records that you delivered to me were confined exclusively to your orchard in Kern County, south of Bakersfield? A. That is right.

Q. Do you recall the question now, sir?

A. 600 trees.

Q. And what was the number of lugs of peaches produced? A. 2,792.

(Testimony of Grant Merrill.)

Q. What was the average number of lugs per tree produced? A. 4.6.

Q. What was your f.o.b. selling price in Kern County? [230]

Mr. Barnard: If the Court please, I don't believe the selling price in 1951——

The Court: No, I will sustain the objection with respect to selling price in 1951. I think it is a little too remote, market conditions change; it would depend upon many variable factors. So I will sustain an objection to that question.

Q. (By Mr. Hamilton): In 1952, Mr. Merrill, how many Merrill Gem peach trees in your orchard in Bakersfield did you have in full production?

A. We had 600 in full production, and we estimated another 100 due to young trees coming in.

Q. Now, do you recall how many young trees you had coming into bearing, and their age?

A. I don't have the figures and I don't remember.

Q. Are those figures in your office?

A. Not any more, no.

Q. This production factor that you placed on those younger trees coming into production, that was made for your own purposes, and for your own use in your own records, is that right?

A. That is right. That was made in order that I could determine what it was costing, my average production, count per tree, and other such information, made at the time, [231] at the end of the harvest, or previously; some time during that year.

(Testimony of Grant Merrill.)

Q. It is not made for——

Mr. Barnard: If the Court please, this is going to be a leading question, and I object before he finishes it.

The Court: Well, attorneys are better able to anticipate than the Court. It is hard for me to rule on a question until I know what the question is.

Mr. Barnard: I think Mr. Hamilton will re-frame it.

Q. (By Mr. Hamilton): Mr. Merrill, this production factor you have placed on your younger Merrill Gem peach trees coming into production, if it was substantially erroneous the only person that would have been fooled by it would have been yourself, isn't that correct?

A. That is right.

Q. Did you attempt to fix it as completely accurately as you could? A. Yes.

Q. I am going to again ask the question: In 1952, Mr. Merrill, how many Merrill Gem peach trees did you have in the Bakersfield orchard in full production?

A. We had only 600 in full production.

Q. And of the productive factor of the younger trees, how many additional trees do your records show those [232] younger trees would represent in 1952?

The Court: Well, what do you mean, would represent? You mean would represent in full production?

Mr. Hamilton: Represent in full production?

(Testimony of Grant Merrill.)

A. I estimate the productive capacity of those young trees as equivalent to 100 mature trees.

Q. Making in 1952 a total of 700 trees in full production? A. Equivalent.

Q. And how many lugs in total did you produce in that year from those trees?

Mr. Barnard: To which we object on the same ground, that it is obviously based upon production from 600 trees in full maturity, and then an unknown quantity of other trees, which is completely dependent upon Mr. Merrill's own opinion, or whim, or whatever he did for his own use, and to add those in without all the factors being known makes the answer completely meaningless.

The Court: Mr. Merrill, have you any records of production in 1952 from the 600 trees that were in full production?

The Witness: We did not keep it separately.

The Court: You did not keep it separately.

The Witness: No, sir.

The Court: And how many young trees were there in the [233] survey, where you found an equivalent number of trees in full production?

The Witness: There were approximately 400 young trees at that time, grafted over trees.

The Court: And were they of various ages?

The Witness: Yes, they were of various ages, yes.

The Court: Some were not in their first leaf, and others were second or third, is that right?

The Witness: They were in various ages, yes.

(Testimony of Grant Merrill.)

The Court: I think I am going to sustain an objection to the question. I think we get somewhat into the field of conjecture, and I doubt if it has the factor that should prevail.

Mr. Hamilton: Your Honor, again, I have known of the elements in here since of course my first discussion with Mr. Merrill, about a month ago. We have again a commodity which is relatively new. This is the oldest Merrill Gem peach orchard there is, not only in Kern County but in the world. This is the best set of records that there are available from an historic point of view. The expectable production in the future might be guessed. That is the reason I brought Mr. Merrill here, recognizing the weakness in the situation, and trying to bring out all of those factors. I plead with the Court that if there is some variable in there that may make it not absolutely accurate, [234] and that variable might be brought to the attention of the jury, as it has in this case, the jury could give that such weight as it might believe is fair, and we might get an historic record of reasonable certainty of it.

The Court: Well, as I have indicated, I think those years in which Mr. Merrill has records of production from trees that are in full production, as I have already indicated I think such evidence is admissible.

Q. (By Mr. Hamilton): Let's take, Mr. Merrill, and you have your copies before you, 1954. The copy I have in front of me shows 900 trees. Now, were there 900 trees in full production then?

(Testimony of Grant Merrill.)

A. Those were very close to full production, as close as you ordinarily get in a commercial orchard.

Q. According to your best recollection, was there any substantial number, or how many younger trees not in full production might there have been in that year of 1954?

A. Oh, I think less than ten per cent.

Q. How many lugs of peaches did you pack from that 900 trees?

Mr. Barnard: I make the same objection.

The Court: Well, as I understand it, Mr. Merrill, in 1954, at least 90 per cent of the trees from which you received production were in full production, is that right?

The Witness: I think better than 90 per cent.

The Court: Better than 90 per cent. So your equivalent of trees in full production, based upon the younger trees, related then to less than ten per cent, is that right?

The Witness: That is right.

The Court: Well, I think under such circumstances I will overrule the objection as to 1954.

Mr. Hamilton: Thank you, your Honor.

Q. The question was, how many peaches did you pack in 1954 from the 900 trees?

A. 7,568.

Q. And what was the average number of lugs per tree?

A. 8.5—8.4, I guess it should be.

Q. Mine shows 8.5.

(Testimony of Grant Merrill.)

A. I believe that is a mathematical error; it should be 8.4.

Q. In 1954, sir, what was your sales price?

Mr. Barnard: If the Court please, I object on the——

The Court: I will sustain the objection.

Mr. Hamilton: That is too remote, you feel, your Honor?

The Court: Oh, I think it is too remote, and the price of fruit, at least my experience, has varied from year to year, it depends upon many factors. In some peach areas there may be climatic or other conditions that affect their production, and that reflects itself in the market on areas that haven't met with those factors. So I think I will [236] sustain the objection to that question, and also the four years before the events which we are reviewing here.

Q. (By Mr. Hamilton): Your Merrill Gem peach orchard in Bakersfield, Mr. Merrill, your harvest and packing time is it approximately the same date as Mr. Grimm's harvesting and packing time?

A. I think it is three to five days later.

Mr. Barnard: May I have that read back? The answer.

(Answer read.)

Mr. Barnard: May I ask which you meant?

The Court: Mr. Grimm's peaches, as I understand it, are three to five days earlier than yours?

The Witness: That is right.

(Testimony of Grant Merrill.)

Q. (By Mr. Hamilton): In 1955, Mr. Merrill, what number of Merrill Gem trees did you have in your Bakersfield orchard in full production?

A. We had 900 in full production.

Q. In 1955?

A. Yes. There were that many in full production. There were some others that were in partial production.

Q. Now, you estimated by using your production factor applied to other trees a total of 1200 trees, is that correct? A. Correct.

Q. Then in 1955 there was a substantial number out of [237] the total of 1200 that were not in full production, is that correct?

A. That is right.

Q. Do you have any estimate of how many? Any recollection in your mind?

A. Yes, there were about 1500.

Q. Mr. Merrill, do you have any record of the production in 1955 from the 900 trees that were in full production? A. No.

Q. You have no separate records on that?

A. No.

Q. Moving now, sir, to 1956, how many trees did you have in 1956 in full production?

A. We still had—oh, I would have to estimate that, about 1,000, maybe a little more.

Q. The figure you have given to me, sir, is 1600. A. That is equivalent.

Q. And out of that 1600, how many were—strike that, if you would, Miss Reporter.

(Testimony of Grant Merrill.)

The Court: Well, as I understand, Mr. Merrill's testimony is 1600 is the equivalent, so that means by that that you had more trees than 1600, is that right?

The Witness: That is right.

Q. (By Mr. Hamilton): How many trees that particular year, if you can [238] recall, did you have to place a production factor on?

A. Approximately 1600—no, I correct myself. It is approximately 1500 or 1600, I think it was 1500.

Q. Sir, in 1957, how many Merrill Gem trees did you have in full production?

A. We had about 2,000, full production or very close to it.

Q. The figure that you have given me is 2,027. How many trees did you have to place a production factor on to arrive at a full production figure of 2,2027?

A. Well, there were about 200 that we had to put a production factor on, and about 200 were not bearing at all.

Q. In other words, of the 2,2027, there would be less than ten per cent represented by trees not in full production? A. About ten per cent.

Q. What total number of lugs of peaches did you harvest from that 2,027 trees?

A. 15,043.

Q. And what was your average lugs per tree?

A. 7.4.

(Testimony of Grant Merrill.)

Q. And what was your f.o.b. price, Mr. Merrill? A. \$3.80.

Q. Mr. Merrill, what were your total costs in 1957, of picking, packing, and the lug and liner?

Mr. Barnard: Now, if the Court please, the question, as [239] I understand it, would deal with trees which were not in full production where obviously the cost per tree or per lug would be much greater, and therefore object to it on that ground.

The Court: Well, as I understand the testimony of the witness, you had 2,027 trees in full production?

The Witness: Or equivalent.

The Court: Oh, or equivalent. Well, how many trees now did you have in full production in 1957?

The Witness: We had about 1,800 full production.

The Court: 1800. Then you had about 200 that didn't produce at all, that is, they weren't old enough?

The Witness: Yes, sapling.

The Court: Then you didn't apply any factor to those?

The Witness: No.

The Court: Then you had 200 to which you applied a factor?

The Witness: Yes.

The Court: Were they at various ages?

The Witness: Yes, they were—no, they were fairly uniform in size; they were grafted over from

(Testimony of Grant Merrill.)

another variety, and they were relatively uniform in size.

The Court: What year were they in?

The Witness: Well, the original root stock, on the roots on which they had been grafted, were planted, most of them in 1944, and some of them later, and they were [240] grafted over, I can't remember the exact date, but it was the early '50s, and they began to come into production fairly uniformly, and by 1957 what was not in production were fairly uniform in size and getting close to full production.

The Court: Let me ask you this, Mr. Merrill, in the harvesting and packing, harvesting particularly, do you have any records showing the cost as between a tree in full production and a tree that is in less than full production?

The Witness: We don't keep records on that.

The Court: You don't keep records on that.

The Witness: Not on the various age trees, except we have orchards that are younger, and are older, and I haven't got the figures here.

The Court: Well, is it your best judgment that the cost of harvesting of the, say, 200 trees to which you applied the factor was more than the cost of harvesting the peaches on the trees in full production?

The Witness: They were so near full production I don't think it would make any difference.

The Court: All right. I will overrule the objection.

(Testimony of Grant Merrill.)

Q. (By Mr. Hamilton): What was your cost for picking, per lug?

A. It was 35.4 cents per lug.

Q. What was the cost of your packing labor?

A. 31 cents per lug. [241]

Q. What was the cost of loading, and whatever pre-cooling or services the rail cars needed?

A. That was seven cents per lug.

Q. And what was the cost of the lug and liner, the box itself?

A. That is the box, the lids, the pad, cups, all the materials that go into making up the box, came to 48.4 cents.

Q. That is a total, is it not, of \$1.16 per lug.

A. No, the total was \$1.21. I don't know who did that total, the total is wrong.

Q. Mr. Merrill, from your Merrill Gem peach orchard in the Bakersfield area, do you have records which will disclose to you all of your expenses in connection with caring for those orchards?

A. Yes.

Q. You have the records which will disclose to you all of your income——

A. Yes.

Q. ——from the orchard? A. Yes.

Q. You have records from which you can find your net profit per year from that orchard?

A. That is right.

Q. Using your knowledge of that net profit, and using that, sir, as a basis, or one of the bases to assist you in [242] arriving at a value, a fair market value for the Charles Grimm orchard in that

(Testimony of Grant Merrill.)

area on March 4, 1957, would you have an opinion as to its fair market value, taking that net profit factor into consideration? A. Yes.

Q. What is that opinion?

Mr. Barnard: To which we object, if the Court please, on the ground that the witness has not yet been shown to possess the qualifications necessary under the statute test of a willing buyer and a willing seller. The net profit factor may have something to do with it, but it certainly isn't the sole criterion of market value.

The Court: I believe, Mr. Hamilton, that I will have to sustain the objection to the question. The cases seem to hold that net profit is such a variable factor, depends upon management, and depends upon so many other factors that may vary. I think there are cases, if I recollect correctly, holding that net profit is not the proper basis or a basis for estimating fair market value. I will be glad to permit you to review it with me. I think it is the Beacon Lumber Company case, in about 123 Cal. App. that passes on this question. I will withhold ruling until after recess.

Ladies and gentlemen, we are going to have our morning recess now. Bear in mind the admonition the Court has given you. We will take a short recess.

(Short recess.) [243]

The Court: Do counsel note the presence of the jury?

Mr. Barnard: Yes, your Honor.

(Testimony of Grant Merrill.)

Mr. Hamilton: So stipulated, your Honor.

The Court: Mr. Hamilton, the Court will sustain the objection asked the witness concerning net profits from his peach orchard.

Q. (By Mr. Hamilton): Mr. Merrill, in the usual and ordinary course of culture of Merrill Gem peach trees, how many primary or scaffold limbs does each tree ordinarily develop?

A. Well, they vary by grove, from a low of eight to a high of—a low of three, to about eight, very high.

The Court: What is the average, I think was the question.

The Witness: I think probably, maybe six—five.

Q. (By Mr. Hamilton): Now, Mr. Merrill, on what sort of wood, in reference to age, does the fruit, the annual crop of fruit, develop?

A. One-year wood.

Q. And to what is the one-year wood attached?

A. Well, it is attached to the two-year wood.

Q. If a primary or major limb is cut off of a Merrill Gem tree at or near the place where that primary is attached to the trunk, will that tree, assuming it is otherwise in a healthy condition, regrow wood to replace the primary that was cut off? [244]

A. Well, it will grow new wood, yes.

Q. Turning your mind now to the Charles Grimm orchard, and it has been shown that some damage or injury occurred in that orchard in the spring of 1957; it has also been shown that a cer-

(Testimony of Grant Merrill.)

tain number of primary or major limbs were cut off of a substantial number of trees in or about October of 1957, would the new growth that you spoke of commence in 1957, or would it commence in 1958?

A. I don't exactly get the question. You are referring specifically to the Charles Grimm place, I presume?

Q. Yes.

A. In that case, the limbs that I saw that spring were dying. Now, cutting them off in October doesn't have anything to do, not with the growth they made that year. That is why I don't quite get your question, sir.

Q. New growth would start immediately after the old limb died, would it not?

A. Even if it became sick, yes.

Q. So there would be some re-growth in that orchard in 1957?

A. Yes, that is right.

Q. Of wood to replace the wood that was damaged, is that right?

A. Yes.

Q. Would that re-growth of wood produce any fruit in 1958? [245]

A. You mean in the Charles Grimm orchard?

Q. Yes.

A. Not on Gems, I don't think. Gems don't set after rank growth wood of the year before.

Mr. Barnard: What was that answer?

The Witness: Gems do not produce on rank growing wood of the year before.

Q. (By Mr. Hamilton): That new growth would

(Testimony of Grant Merrill.)

of course produce no fruit in 1957? A. No.

Q. Would there be fruit on that new growth in 1959? A. Yes, there should be.

Q. What, in your opinion, and from your experience with the Merrill Gems, would be the percentage of the production in 1959, as related to the normal production from that limb which you could have expected if it had remained in a healthy, normal condition on the tree?

A. Well, I don't expect you would have over 20, 25 per cent of full production on that limb.

Q. In 1960, there would be fruit on that re-growth, and on the new wood that came out of it, would there not?

A. Yes, there would be some fruit.

Q. And what percentage of a normal crop would you expect in 1960? [246]

A. Well, I think 40, 45 maybe, not over 50 per cent; probably 45.

Q. And in 1961, what percentage of a normal crop could you expect?

A. Well, I think you would get up pretty close to—the maximum production likely to produce might be 60 per cent, or two-thirds, something like that.

Q. Around 60 per cent? A. Yes.

Q. The following year, 1962, would it be at the maximum production that that new re-growth of wood could be expected to produce?

A. I think so, if it was all cared for.

Q. Would that be the equivalent to what the

(Testimony of Grant Merrill.)

wood which represents that limb, would your production from that limb be equivalent or equal to the production you could have expected from that limb if it remained on the tree in a normal, healthy condition?

A. No, I don't think it will ever come back to normal.

Q. About how close to normal will it come, in your opinion?

A. Well, on trees of that age, which are relatively young, I think it could come back to probably around 80 per cent.

Q. And for that portion of the tree the production [247] from that area of it would thereafter remain at approximately 80 per cent?

A. I think so, yes.

Q. Mr. Merrill, when you cut a primary or a major limb off of a Merrill Gem tree, does it shorten the life of the tree?

A. Oh, yes, very definitely.

Q. Would you have an opinion, sir, on how much shorter the life of the tree would be, and we are referring to Merrill Gems, if all of the primary, all of the limbs were cut off the tree, by taking into consideration the fact that the trunk and root system apparently remain in a healthy normal condition?

A. Cut them all off?

Q. Cut them all off.

A. Well, sometimes the shock is so great it kills the tree. Ordinarily, if all limbs are cut off, it is a pretty severe shock, and wood rot develops

(Testimony of Grant Merrill.)

down through the heart it is pretty bad. I would say it would cut at least ten years.

Q. If two, or more than two of the primary or the major limbs were cut off, two out of the average of five, how much would it shorten the life of the tree?

A. Oh, probably about half that much, about five years.

Q. Mr. Merrill, in 1957, with special reference to the [248] spring period of 1957, from, say, the first of March, to after harvest time in your Merrill Gem peach orchard in Kern County, was there any bacterial disease of any kind?

A. I didn't observe any.

Q. Throughout the spring of 1957, did your orchard, your Merrill Gem orchard, remain in a normal healthy condition? A. Yes.

Q. Mr. Merrill, do you use in your ordinary spray program oil? A. Yes.

Q. When do you use oil in your spray program?

A. When the trees are dormant, in January and early February.

Q. Do you ever use oil after the trees have broken dormancy, after they show signs of life in the spring? A. No.

Q. Why? A. I think it is dangerous.

Q. What is the danger?

A. Oh, I think you can kill the tree and kill the limbs.

Q. Mr. Merrill, have you ever used an insecti-

(Testimony of Grant Merrill.)

cide or an agricultural chemical sold under the trade name of Mitox?

A. No; not to my knowledge. I had a foreman down there and he generally kept me informed what he put in, but I don't remember he ever said he used Mitox. [249]

Q. From your experience and your use of oil as a regular part of your spray program, is the Merrill Gem peach[®] tree more susceptible, or less susceptible, to oil injury than other varieties of peaches?

A. I believe it is more susceptible.

Mr. Hamilton: You may cross examine.

Cross Examination

Q. (By Mr. Barnard): Mr. Merrill, you testified that you grow peaches in the Red Bluff area?

A. Yes.

Q. And also in the Bakersfield area of Kern County? A. In Kern County.

Q. Is there any difference in those areas?

A. Difference in what respect?

Q. As to the type of peaches which must be grown to be successful?

A. There are some limitations in both areas as to the varieties that will be profitable.

Q. It is true, is it not, that Kern County being somewhat warm has a very mild or very short season of dormancy?

A. No, it has a long season of dormancy.

(Testimony of Grant Merrill.)

Q. Does it have as complete a dormancy as you find in a colder climate? [250]

A. It goes just as completely dormant, yes.

Q. They do? A. Yes.

Q. Has the growing of peaches in the Bakersfield area always been successful?

A. I don't think so.

Q. In other words, at one time or another, some years back they tried to grow peaches there and failed?

A. That is what I was informed.

Q. And now in recent years it is being tried again with new, brand new stock?

A. I think I was the first one to try it.

Q. And that was in 1944?

A. I made the planting then.

Q. So for approximately 14 years there has been a commercial growing of peaches in the Kern County area?

A. There has been some before that, but I mean I have grown in that period, yes.

Q. Now, you testified that in 1944 you planted ten acres of peaches?

A. No, I planted 60 acres of peaches, 10 acres of Gems.

Q. I beg your pardon. Ten acres of Gems.

A. Yes.

Q. And you testified that of that 1944 planting some are left. Can you tell us approximately—first, how many [251] trees would there be in ten acres? A. There would be about 900.

(Testimony of Grant Merrill.)

Q. And how many of those 900 are still in that same orchard?

A. I would estimate about half.

Q. In other words, about 450?

A. That is correct.

Q. What happened to the other 450?

A. They were on roots that was not adapted to nematodes in the soil, and we had to change to another root, to grow them on other varieties of root stock to withstand the nematodes.

Q. And so those trees were pulled?

A. That is right.

Q. And new trees substituted?

A. That is right.

Q. I take it all 450 were probably not pulled at the same year?

A. Yes, most of them were pulled the first or second year, '45 and '46.

Q. '45 and '46. Then the re-plants, are they all still there, or has there been a continual change of trees?

A. No, those re-plants are mostly there; very few replacements.

Q. All right. Now, you say that you have to change [252] roots. What root stock was the original planting on?

A. It was supposed to have been on Chelill.

Q. Was it or wasn't it?

A. We can't tell, you have to take the word of the nurseryman, he said it was on Chelill.

Q. And you changed to what root stock?

(Testimony of Grant Merrill.)

A. To S-37.

Q. Are all of your trees now, except the 450 that still remain, on S-37?

A. That is what we bought them for.

Q. In other words, out of all the trees you testified that you planted up, up to close to a couple of thousand now, that is in Kern County, are all on S-37, except the 450 remaining out of the first planting? A. Yes.

Q. Now, you stated that there was a variation in area in Kern County, insofar as harvest date is concerned? A. Yes.

Q. And that variation was all the way from, as I recall your testimony, early May to early June?

A. No. You mean Merrill Gems?

Q. Yes. A. Late May.

Q. Oh, late May to early June. A. Yes.

Q. And what would cause the variation?

A. It would be a—it is a—it warms up quicker in some areas than others in the spring; in other words, it is warmer in the spring.

Q. And that is true within the confines of Kern County itself? A. That is right, yes.

Q. And does that same variation in temperature have any effect on production?

A. Well, it is—not the spring temperature, no. The winter temperatures do.

Q. Do the winter temperatures vary in one part of Kern County to another?

A. I believe they do.

(Testimony of Grant Merrill.)

Q. Would variations in kind and quality of soil have any effect on production?

A. You mean amount of production?

Q. Amount of production, yes, and in all these questions I am referring to Merrill Gem peaches.

A. Yes, the soil would affect production.

Q. All right. Does the soil vary in kind and in type in various parts of Kern County?

A. Yes.

Q. Now, you mentioned producing so many lugs of peaches at various times from your orchard. May I ask what size lug [254] you are referring to?

A. Referring to Los Angeles lug.

Q. And how much does it weigh, approximately?

A. It runs net weight around, in Merrill Gems, from 19 to 21 pounds.

Q. 19 to 21 pounds. Do you know whether or not that is the same lug that Mr. Grimm uses?

A. I have seen him using L.A. lugs, but I haven't seen all that he has used. I presume he uses them.

Q. In other words, you ship your peaches in the same lug as he does, so far as you know?

A. Yes.

Q. Now, in 1951 you testified you had 600 trees in full production? A. That is right.

Q. And in 1952 you stated that you had 600 trees in full production, and from your formula arrived at another 100 trees? A. Yes.

(Testimony of Grant Merrill.)

Q. Can you tell us how many trees you had beyond the 600?

A. You mean that had any production at all on them? 1952 you are talking about?

Q. 1952.

A. That is a little bit complicated, because that was [255] the year we grafted some other varieties over to Merrill Gems, and I think that was the year, if I remember right, or '53, and they were just new grafts and would bear nothing, and so there *then be* about 300, I guess, of those in 1952 that were old enough to bear some fruit that were not in full bearing.

Q. In other words, would they be, say, in their fourth or fifth leaf?

A. No, they would be various ages.

Q. Now, what I was driving at, Mr. Merrill, is simply this, that in 1952 you had 600 in full production.

A. Yes.

Q. In 1954 you testified that you had 900 in full production?

A. That is right.

Q. So that in 1952 you must have had 300 trees in at least their fourth or fifth leaf to arrive in '54 at a total of 900.

A. I was talking about tree equivalents. There were 300 trees that had some fruit on them in 1952, but only about the equivalent of 100 trees.

Q. Then in 1954, did you mean that the 900 trees were not in full production, but that was an equivalent?

A. No, by 1954 the original planting of about

(Testimony of Grant Merrill.)

900 trees were essentially in full production. [256]

Q. And that is true, is it, as you go on through the years 1955, 1956 and 1957?

A. Well, as I say, in 1952 we grafted these other varieties over and they do show some production in 1955, and they reached essentially full production in my last year.

Q. You mean in 1957? A. Yes.

Q. Now, I am a little confused about 1957. How many actual trees did you have in full production, not counting your formula or anything else, actual trees?

A. Not counting equivalent, I believe it would be about 1,800 or 1,900.

Q. Between 18 and 19 hundred?

A. Something in there. I couldn't say exactly, it is an estimate.

Q. And how many trees did add to that because of your formula in figuring the number of trees you had in production?

A. I don't understand the question. I don't know what you mean by that. I don't know how to answer.

Q. In figuring your production for the year 1957 you gave a figure of 15,043 hgs?

A. That is right.

Q. How many trees did you figure that came off of?

A. I figured that was an equivalent of 2,000; in fact we used the figure 2,027. [257]

Q. 2,027. I just want to be sure I understand

(Testimony of Grant Merrill.)

you; that was 1,800 trees in full production, plus enough trees in partial production to equal in your opinion 2,027.

Mr. Hamilton: Your Honor, that is a misquotation, probably inadvertent; 1800 to 1900 I believe is what the witness testified.

Mr. Barnard: That is correct.

Q. In other words, all I am asking you, so that I will understand, is that the difference between that 18 or 19 hundred and the 2,027 is made up of a number of trees that you figure——

A. That is right.

Q. ——to be the equivalent of that many?

A. That is right.

Q. Now, was there anything unusual about the year 1957 insofar as price is concerned?

A. I think it averaged a trifle less than it had, including the big year of 1955, not counting the big year of 1955 it was about an average price, but if you included the year 1955 it would be lower than that.

Q. In other words, then, the price in 1957 you considered to be an average price if you eliminate the exceptionally good year of '55?

A. That is right.

Q. Was there anything unusual in the year 1957 cropwise?

A. On my orchard, I think some trees were pruned a little [258] too heavy and we should have gotten a little higher production. Otherwise it was, I think, normal. We should have gotten a little big-

(Testimony of Grant Merrill.)

ger crop if it had been pruned the way I wanted it.

Q. That is a condition existing in your own orchard? A. My orchard.

Q. Was there anything in the weather, or in the amount of rainfall that made 1957 either better or worse than the average year?

A. Well, we had to irrigate more, because it rained less.

Q. Does that have an effect on the production?

A. Not if you irrigate.

Q. If you irrigate plenty then it is normal?

A. That is right.

Q. Now, referring to your estimate as to the percentage of production on new growth, you recall that, Mr. Merrill? A. Yes.

Q. I was a little confused as to the percentages, as to whether the figures you gave were the percentages of what you would expect from the original limb of the age that it would have been, or whether those were percentages of what you would expect from the original limb when in full production?

A. That is the percentage of the limb when it was in full production, yes, on a normal tree. [259]

Q. On a normal tree. In other words, you stated that in 1959, for example, the percentage would be somewhere between 20 and 25 per cent; that would be 20 to 25 per cent of a normal limb in full production? A. That is correct.

Q. And the same with the other percentages?

A. That is correct.

Q. Now, would the fact that one major limb

(Testimony of Grant Merrill.)

had been cut affect the production on the balance of the tree?

A. It might affect total production probably in a little better size on what was left, a small amount, until the tree got up to near normal, to its maximum size, then there would be no particular difference.

Q. In other words, during the period that the secondary or re-growth is taking place, the peaches on the remainder of the tree might be of slightly larger size? A. I think they would be.

Q. Do peaches of a larger size bring more money on the market? A. They do.

Q. Are peaches graded by size?

A. Yes. Well, they are not graded, the grower puts the different sizes in different boxes. They are not graded mechanically; the grower grades them by hand.

Q. I see. And a box, in other words, which is filled [260] with larger peaches brings more than a box which is filled with smaller peaches, is that right? A. That is correct.

Q. Now, this figure that you gave us for the year 1957 of \$3.80 per lug, is that the average price?

A. That was the average price after deducting all the costs of selling and shipper; in other words, the check I got from the man who sold them for me.

Q. Where do you sell your peaches? And by that I mean simply this: do you sell them in Kern

(Testimony of Grant Merrill.)

County to a buyer, or do you ship them to the east to be sold there?

A. Well, in 1957 I sold them different than I ever had before in my life; I sold through one broker, in 1957.

Q. You sold your entire crop to one broker?

A. Well, he handled them on consignment, that is, he sold them to the best advantage as a market handler.

Q. Is that \$3.80 then the average price of what other Merrill Gems were worth, or other Merrill Gem growers received last year?

A. Oh, I think in Kern County they received considerably more, because I am in a later district than the others and theirs brought more money.

Q. You think you got less?

A. Oh, yes, I know I did.

Q. Than the average grower. [260-A]

A. Because I am in a later district than most of them, than all of them, I guess.

Q. Now, you stated that you had no bacterial diseases in 1957. Did you have any other form of disease in your Merrill Gem orchards?

A. No.

Q. As far as you know, you had no fungus?

A. I don't recall seeing any curling leaves—

Q. Or no virus?

A. —or any ordinary diseases that we have in the orchards on some places.

Q. And as far as your orchard was concerned it appeared perfectly normal to you?

(Testimony of Grant Merrill.)

A. Yes. I don't remember seeing anything, any diseases there.

Q. In the spring of 1957 you saw Mr. Grimm's orchard, of course? A. Yes.

Q. Did you see any other Merrill Gem orchards which were not in a normal condition?

A. You mean in Kern County?

Q. In Kern County?

A. Well, I don't know what you mean by normal condition. Spray damage?

Q. Which was suffering from a disease, or damage or any [262] kind?

A. To include, I had a little spray burn myself on two half trees, or maybe three half trees.

Q. Did you see any other orchards, other than Mr. Grimm's, that were not in normal condition in 1957, regardless of the cause?

A. I don't remember seeing any, no.

Q. Did you see any any place else in the San Joaquin Valley? A. Yes.

Q. Where were they?

A. In Tulare County.

Q. Were those Merrill Gems also?

A. Yes.

Q. Was one orchard involved, or more than one?

A. Only one.

Q. Only one. What was the condition of that orchard—withdraw that. What time of the year did you see it?

A. It was in the spring; I can't remember the month.

(Testimony of Grant Merrill.)

Q. What was its condition as far as visual observation was concerned at the time you saw it?

Mr. Hamilton: Your Honor, I am going to object to anything further on this line of questioning unless some similarity between the two orchards is established. I see no purpose in an isolated orchard without establishing some similarity [263] between that and the Grimm orchard.

The Court: You might find out, Mr. Barnard, how old the orchard was.

Mr. Barnard: May I ask first, your Honor:

Q. Mr. Merrill, was the condition that you saw in the orchard in Tulare County anywhere similar to the condition you saw in Mr. Grimm's orchard, or was it something completely different?

A. No, it was similar, but worse.

Q. Similar but worse. Whose orchard was it?

A. Mr. Cochran, I forget which Cochran it is.

Q. And that was Merrill Gem trees?

A. Yes.

Q. How old were they?

A. I would have to estimate. I believe they were nine or ten years old.

Q. Will you describe the condition which you saw?

A. Well, the limbs were dead or dying, wilted, they had started to come out and the leaves were—had started to come out and died back, there were signs of new growth coming around the bottom, some trees almost entirely, other trees only limbs here and there.

(Testimony of Grant Merrill.)

Q. And was that condition fairly uniform through the entire orchard?

A. Oh, it was spotted here and there. The whole orchard [264] was affected, but it was spotted here and there.

Q. In other words, some trees would have more than others? A. That is right.

Q. Were some trees completely normal?

A. I can't remember any of them that were completely normal. There might have been.

Q. Now, Mr. Merrill, what kind of oil do you use as a dormant spray? I am not necessarily referring to brand.

A. I have never determined. My foreman picks the type of oil to use, and I never inquire, and he follows the recommendation of the people from whom he purchases.

Q. Do you know the amount of oil that he uses in the spray?

A. Well, I believe he uses from three to four gallons per 100, depending on whether he uses a mixable oil or oil emulsion.

Q. And has he on occasion used as high as five per cent?

A. I can't recall, and I don't think he would. I would never have recommended it, and when we have talked about it he has never talked of over four, sometimes less.

Q. As far as you know the maximum uses has been four? A. Yes.

Q. Now, you stated as your opinion that Merrill

(Testimony of Grant Merrill.)

Gem trees were more susceptible to oil injury than other [265] varieties of peaches. Will you tell me upon what you base that opinion?

A. Well, I base it on four bits of evidence. I base it on the Cochran place I just told you about, where I thought that was oil injury, and he had some other varieties in there that didn't seem to be damaged. I base it on the Grimm orchard which I thought was affected by oil, and his other orchards didn't. I was told by my field man, under my employee, located in Selma that the Gems seemed to be more affected, and I was told by the farm adviser in Fresno County, John Quail, that the Merrill Gems seemed to be affected worse.

Q. In other words, this opinion of yours is based on what people have told you, and not on any personal experiments you have conducted?

A. These two cases were observation, and two were told by others.

Q. Do you know what Mr. Cochran had sprayed on his trees?

A. He told me he sprayed oil but didn't say what kind, or anything about it.

Q. Did he tell you what percentage?

A. No, he did not, not that I remember.

Q. Did he tell you when it was sprayed?

A. He told me it was sprayed, as I remember, the last [266] part of January.

Q. Now, just one more question, Mr. Merrill, and that is with regard to the re-growth of primary limbs. Is it your testimony and your opinion that

(Testimony of Grant Merrill.)

that re-growth or that new limb will never reach the full amount of production that the original limb would have reached? A. That is right.

Q. And this would be true even if the re-growth is 10 to 12 years old?

A. I don't think it would ever come back to normal.

Mr. Barnard: I think that is all.

Redirect Examination

Q. (By Mr. Hamilton): Mr. Merrill, you sold the Merrill Gem peach tree stock that Charles Grimm used to him, did you not?

A. I am not — yes, I sold those original trees. Yes, I did.

Q. And is it not correct that those trees are on the S-37 root stock? A. That is right.

Q. Mr. Merrill, would you explain to us this tree equivalent method that you use in bringing a certain number of trees at a given point of production into a bundle which you can say is a certain number of trees in full production? Would you explain just how you do it? [267]

A. Well, I take a book with four columns on it, and I walk down the road, and we have a road every four rows of trees. We look on both sides of the road, and we estimate that a tree is half as big, half the production capacity, or a quarter, or three-quarters, according to its size. And then occasionally, in order to check ourselves, we will count the length of growth on a full bearing tree and see how

(Testimony of Grant Merrill.)

many lengths of new wood there is on the new piece, total new wood, and then we count, let us say, we estimate half and we will count the number of length of fruiting wood on that, and we determine whether or not we are estimating correctly. And if we are off on our estimate, we adjust in accordance with the length of the total footage of fruiting wood on the tree, and we don't do that every tree or very many, but we do it throughout the orchard to keep ourselves in check with how accurate we are.

Q. Therefore, if a tree has in measurement of fruiting wood, that is wood on which fruit will be produced, a measurement of fruiting wood one-half that which exists on a normal tree in full production, then you give it a factor of one-half tree, is that correct? A. That is correct.

Q. Mr. Merrill, there are two different types of oil used in spray programs, are there not?

A. I believe there are several. [268]

Q. And one oil is designed specifically to be used in a dormant spray, or spray on trees in a dormant condition, is that correct?

A. Yes, designed for that purpose.

Q. And there is a different oil that is designed to be used on trees after they have broken dormancy, is that correct?

A. When they are in foliage, yes.

Mr. Hamilton: No further questions.

The Court: Mr. Merrill, you stated you sold the trees in question to Mr. Grimm?

The Witness: That is right.

(Testimony of Grant Merrill.)

The Court: And you originated this Merrill Gem variety?

The Witness: I did.

The Court: Do you hold a patent on it?

The Witness: Yes, I do.

The Court: I see. And do you control the sale of Merrill Gem peach trees?

The Witness: Completely, as far as possible.

The Court: I see. I have no further questions.

Recross Examination

Q. (By Mr. Barnard): Just one question. Mr. Merrill, since you testified there were various kinds of oils, one oil is made you testified to be sprayed in the dormant stage. [269] A. That is right.

Q. And other oils are designed to be sprayed on foliage? A. That is right.

Q. The foliage oil is a much lighter oil, isn't it?

A. I have no knowledge about it at all as to its weight. I have heard some explanations about unsulfinated residue but I am not sure I know what that means, so I am afraid I can't go into the chemistry of it.

Q. In other words, once again, it is more or less relying just on your general knowledge of what you may have picked up from your foreman?

A. That is it, general knowledge about different types of spray oil, winter oils and summer oils.

Mr. Barnard: I have nothing further.

The Court: Will Mr. Merrill be needed further?

Mr. Hamilton: Not that I know of, your Honor.

(Testimony of Grant Merrill.)

Mr. Barnard: No, your Honor.

The Court: Mr. Merrill, as far as I am concerned, you are excused.

Members of the jury, we will recess for noon, and we will reconvene at 1:30. Bear in mind the admonition I have heretofore given you.

(Thereupon at 12:03 p.m. a recess was taken until 1:30 p.m. of the same day.) [270]

Afternoon Session, 1:30 p.m.

The Court: The jury is present?

Mr. Barnard: So stipulated, your Honor.

Mr. Hamilton: So stipulated, your Honor. We will call Glen Moody.

GLEN A. MOODY

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Glen A. Moody.

The Clerk: Have that seat.

Direct Examination

Q. (By Mr. Hamilton): You are Glen Moody, are you not? A. That is right.

Q. Where do you reside, Mr. Moody?

A. In Bakersfield.

Q. What is your business or occupation?

A. I am a farmer and grower and shipper of peaches.

Q. Where is the land located on which you grow peaches?

(Testimony of Glen A. Moody.)

A. About 20 miles south of Bakersfield; in reference to Mr. Grimm's place about three and a half, I think, northwest of Mr. Grimm's property.

Q. How many acres do you have in peaches?

A. 120.

Q. And how many acres do you have in Merrill Gem peaches? A. I believe it is about 18.

Q. Mr. Moody, in 1957 how many Merrill Gem peach trees did you have that were in full production? A. About—1957?

Q. Yes.

A. About ten acres in full production, I think.

Q. Do you recall the number of trees? Let me put it this way, Mr. Moody. May I ask the question, at or near full production?

A. Well, we have 18 acres and about ten acres, let's see, 63 trees to a row, 16 rows, what is that? 1,016 trees, something like that were in full production, and the balance, which would be some 800 odd trees were about two-thirds of full production, something to that effect.

Q. The 800 and some trees you referred to as being two-thirds or better production, what leaf stage, what age? A. Fifth leaf.

Q. They are in the fifth leaf. When does a Merrill Gem in your experience come into full production? A. Probably sixth to seventh year.

Q. Including the trees that you gave, 1,016, that were at maximum production, and including with those the trees that were in the fifth leaf, how many trees did you have? [272]

(Testimony of Glen A. Moody.)

A. I believe there is 1,880 trees, or something pretty close to that.

Q. If I may refresh your recollection, 1,884 trees, is that correct? A. That sounds correct.

Q. Mr. Moody, in 1957, how many lugs of peaches did you produce and sell from those 1884 trees?

A. In 1957 we sold 11,063 boxes of peaches, of Merrill Gem peaches.

Q. What was the f.o.b. Bakersfield price which you received?

A. The net f.o.b. our packing shed was \$4.83 average.

Q. What were the harvest costs, picking, packing, lug and liner?

A. Pretty close to \$1.15 per box.

Q. That is what is known as a Los Angeles lug?

A. L.A. lug, yes.

Q. In your opinion, and in lugs per tree, Mr. Moody, and from your experience, what production could you expect reasonably from Merrill Gem peach trees that were in the fifth leaf?

A. The fifth leaf, oh, we would generally figure five or six boxes per tree.

Q. In the spring of 1957, Mr. Moody, did your Merrill Gem peach orchard show any symptoms of any disease of any kind? [273] A. No.

Q. Did your Merrill Gem orchard appear to remain in a healthy, normal, vigorous condition throughout the summer of 1957?

A. '57? Yes, it was vigorous.

(Testimony of Glen A. Moody.)

Q. Mr. Moody, do you regularly use oil in your spray program?

A. I wouldn't say regularly. We do use oil sometimes.

Q. Have you used oil as a spray on your Merrill Gem peaches in the pink bud stage?

A. This year we used a little oil as a spreader in some copper spray we put on. We didn't use it as an oil spray, but we put one per cent oil in for spreader during the swollen bud stage. As soon as the buds got a little too pink we quit though, but that was only one per cent.

Q. On whose advice was it that you used one per cent?

Mr. Barnard: If the Court please, I object to that——

The Court: I will sustain the objection to the question.

Q. (By Mr. Hamilton): Mr. Moody, did you have any conversation with a Harold Fisher, the manager of Cal-Spray, the Bakersfield office, concerning the amount of oil you should use?

A. When?

Q. In the spring of 1958, before this application of oil which you said was, I believe, in the swollen bud stage? [274]

A. Yes.

Q. And what advice did he give you concerning the use of oil?

A. Well, as I recall, he only suggested that we could use quite a bit of oil, and then when he saw

(Testimony of Glen A. Moody.)

the buds, why, he said, one and a half per cent would probably be enough, so I put on one per cent.

Q. He advised you to use one and a half per cent?

A. He thought we could get by with that.

Q. Did he say anything to you concerning the maximum amount of oil you should use?

A. I think he probably figured that was maximum at that stage.

The Court: I will strike the statement of the witness; it is not responsive; and instruct the jury to disregard it.

Q. (By Mr. Hamilton): What did he say as best you recollect? What did he say in reference to the maximum amount of oil?

The Court: That is if he said anything.

The Witness: Well, we discussed it quite a bit. I was trying to think.

Q. (By Mr. Hamilton): You are not required to use the exact words, but the import of what he said.

A. Well, the problem, we discussed it several times, [275] and as days went by the buds swoll a little more, and we had to revise our estimates of what could be used, and as I recall, when we started spraying he suggested at one time we were going to use two per cent, and then we decided we couldn't do any good with that anyway, and the only thing we could do was use it as a spreader, so we dropped it down to one.

Q. And that is your best recollection?

(Testimony of Glen A. Moody.)

A. Yes. I am sorry I can't give more details than that.

Q. This swollen bud stage you have described, Mr. Moody, is that before any of the buds open?

A. Well, there was pink showing, quite a little pink showing.

Q. It might be described as the pink bud stage?

A. Probably the early pink bud stage, yes.

Q. Why did you stop using the oil before you had finished the full coverage?

A. I just got a little worried, some of the buds were opening, some of the pistils were showing, and I was afraid I would burn them off.

Q. Did you regard the use of oil in that stage as dangerous? A. I did.

Q. Mr. Moody, have you ever used an agricultural chemical and insecticide, I believe it could be called, that [276] is sold under the trade name of Mitox? A. Not to my knowledge.

Mr. Hamilton: You may cross examine.

Cross Examination

Q. (By Mr. Barnard): Mr. Moody, you testified that the picking, packing and I believe shipping costs of your Merrill Gems averaged \$1.15 a lug?

A. \$1.15 a lug.

Q. Yes. The picking, packing and shipping is not the only expense that goes into raising a crop of Merrill Gem peaches, is it? A. No.

Q. In 1957 you testified that you had no disease in your Merrill Gem orchard?

(Testimony of Glen A. Moody.)

A. No general disease; we may have had an isolated tree here and there with a problem.

Q. With a what?

A. Oh, there is always a tree now will show up with crown gall, or we had — one little problem, a crop duster airplane flew over and spilled some sort of material out and we had about 10 or 15 trees that were damaged from that. Other than that we had no trouble.

Q. Have you ever had disease in your Merrill Gem orchard? A. No. [277]

Q. How old are your trees?

A. Well, the oldest ones are ten years.

Q. And the youngest ones? A. Five.

Q. Now, what was the occasion in 1958, the reason for your spraying?

A. Well, we had a rather heavy infestation of brown mite, and we wanted to kill them in the winter, if we could, so we attempted to spray for that, but because of weather conditions, it rained so often, we couldn't do it quick enough, and we dropped that spray and then ended up by using only a spray for leaf curl at that season, because it was too late to use the regular oil; at least I felt it was. It was in March, and I thought that was too late to use oil. So we just put on the other spray, and now we are trying to kill the mites.

Q. I see. And what kind of oil did you use?

A. Well, it was an oil emulsion, but I—clean-up oil, they called it.

(Testimony of Glen A. Moody.)

Q. Is that a dormant spray oil, that is an oil for dormant spray?

A. I believe that is what it is usually called.

Q. As distinguished from a foliage spray?

A. Yes.

Q. And you sprayed one per cent of that in the early [278] pink bud stage? A. Right.

Q. Did you get any damage at all?

A. Not that I could see.

Q. The reason that you didn't use more than one per cent is because you were afraid you would damage the buds? A. Yes, buds or foliage.

Q. Is that the only reason?

A. We could have injured some of the other foliage with buds swelling there.

Mr. Barnard: I think that is all.

The Court: That is all, Mr. Moody.

Mr. Hamilton: May this witness be excused?

Mr. Barnard: Yes.

The Court: Mr. Moody, you are excused as far as the Court is concerned.

The Witness: Thank you.

(Witness excused.) [279]

Thursday, April 10, 1958, 2:00 p.m.

* * * * *

Mr. Hamilton: I will call Ashley Browne.

ASHLEY C. BROWNE

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name.

The Witness: Ashley C. Browne.

The Clerk: Have that seat there.

Direct Examination

Q. (By Mr. Hamilton): You are Ashley C. Browne, are you not? A. Yes.

Q. And that Browne is spelled with an "e" on the end, B-r-o-w-n-e? Is that correct?

A. Yes.

Q. Where do you reside, Mr. Browne?

A. 5060 Otis Avenue, Tarzana, California.

Q. Mr. Browne, what is your business occupation?

A. I am an entomologist with Rohn-Haas Company, Philadelphia.

The Court: May I inquire, where is Tarzana, California?

The Witness: It is in the San Fernando Valley.

Mr. Hamilton: Tarzana is a small town in——

The Witness: It is a suburb of Los Angeles.

Mr. Hamilton: ——near Los Angeles.

Q. Mr. Browne, where did you take your initial schooling?

A. I attended Stanford University, and then missed two years in World War I; when I returned I went to the University of California at Berkeley, took work there; took work at the University of California at Davis, College of Agriculture, and

(Testimony of Ashley C. Browne.)

received my degree in agriculture from the University of California at Berkeley.

Q. What sort of work did you specialize in during the period of your formal schooling?

A. While I was at Stanford I specialized in botany, entomology, chemistry, engineering; and when I went to Berkeley I took more chemistry, and plant pathology, and horticulture; and at Davis I took field work in those courses, irrigation practices, viticulture. And the idea was to prepare myself with as broad a base as I could get.

Q. After your graduation from Davis, sir, what was your first employment?

A. I was superintendent for the A. M. Standish Ranch at Milpetas, 168 acres of orchard, with some dairy and alfalfa.

Q. And who were you next employed by?

A. I went from there in 1923, '22 or '23, to the California Spray-Chemical Company, and worked for them until [281] about 1929. I went to Sacramento for them, and opened the Sacramento office for California Spray-Chemical Company, and there I had charge of the sales and field work related to the use of California Spray-Chemical Company's products. In 1929 I wrote a manual, a book, for California Spray-Chemical Company, listing the chemicals the company used,—the chemicals the company manufactured and their use.

Q. This book was a handbook, was it not, designed for use by Cal-Spray employees?

A. That is right.

(Testimony of Ashley C. Browne.)

Q. It was published in due course by the California Spray-Chemical Company?

A. That handbook was published by the California Spray-Chemical Company, and I believe it carries the imprint date of 1929.

Q. After leaving the employ of Cal-Spray, what did you do, Mr. Browne?

A. I left California Spray-Chemical Company to join the State Department of Agriculture as associate state entomologist.

Q. Was that the State Department of Agriculture of California? A. That is right.

Q. And how long were you with the State Department of Agriculture? [282]

A. I was with the State Department of Agriculture until about mid summer of 1933.

Q. Who were you then employed by?

A. United States Forest Service.

Q. In what capacity?

A. As entomologist in forest entomology.

Q. How long were you with the United States Forest Service? A. Until 1936.

Q. Whom did you then go to work for?

A. I went to the University of Hawaii as entomologist and specialist in vegetable production.

Q. And how long were you with the University of Hawaii?

A. I was with the University of Hawaii from September 1936 until May of 1943.

Q. And then whom did you go to work for?

A. I left the University of Hawaii to go to the

(Testimony of Ashley C. Browne.)

South Pacific for the Board of Economic—Foreign Economic Administration, which was one of the special offices created by the President during the war, World War II.

Q. And what was the purpose of that?

A. The purpose——

Q. What work did you do?

A. The purpose of that project was to produce fresh vegetables for the armed forces ashore to supplement the rations. [283]

Q. In a general way, in what general area did you work in that capacity, and generally what did you do?

A. While I was in the South Pacific I ran farms, running from 50 to 60 acres up to 2,300 acres.

Q. Located where?

A. In the Fiji, New Caledonia, Guadalcanal, Bougainville, Guam, Saipan, and Pelew.

Q. And how long were you with the Foreign Economic Administration?

A. I was with the Foreign Economic Administration until the close of the war, I believe that was in August of 1945, wasn't it? 1945.

Q. And whom were you next employed by?

A. Within a matter of days after arriving back in San Francisco I was employed by Rohn-Haas Company, to work in the agriculture chemical section in the San Francisco—in the westerly area of that company's operation.

Q. I take it from what you say that the Rohn-

(Testimony of Ashley C. Browne.)

Haas Company is a company manufacturing or operating in the field of agricultural chemicals?

A. The field of agricultural chemicals is one of many in which the company is engaged. I am only engaged in the agricultural section.

Q. As an employee of Rohn-Haas, what is your specialty? What do you generally do? [284]

A. My work entails field testing of new compounds as they are brought out, testing them for their own value in the control of insects and diseases, and of comparing those materials with competitive products, and third, of supervising and checking on the use and performance of established chemicals which the company manufactures and has released for general sale.

Q. In the spring and summer of 1957, Mr. Browne, did you conduct any experiments on the Charles W. Grimm ranch south of Bakersfield?

A. Yes.

Q. What were the nature of those experiments?

A. I was testing some new compounds on grapes and also testing some compounds on nectarine trees.

Q. How often during the spring and summer of 1957 would you visit the Grimm ranch for the purpose of conducting your experiments there?

A. I was on the Grimm ranch, first to see Mr. Grimm about securing his consent, oh, I think it was probably early in March. Then I was on there from about the middle of March to the middle of October when I concluded my observations on the

(Testimony of Ashley C. Browne.)

ranch of the grapes. I was on there at intervals of about ten days to two weeks.

Q. In the course of your work, Mr. Browne, have you ever conducted any experiments or tests in which the insecticide Mitox was one of the products being tested? [285]

A. No, sir, I have not.

Q. You are familiar with Mitox, are you not?

A. Only having seen a package and the label.

Q. The only familiarity you have with it then is what you discovered from the label, is that correct?

A. That is right.

Q. Mr. Browne, during the spring and summer, and commencing in March of 1957, were you in the Charles W. Grimm peach orchard at any time?

A. Yes, sir.

Q. Do you recall the first time that you examined the Charles W. Grimm peach orchard?

A. I recall very vividly going into the orchard on the morning of March 18th, with Mr. Grimm, to look at his Merrill Gem peaches.

Q. What did you observe?

A. Peach trees in that Merrill Gem group were strikingly different in appearance from the two varieties on either side, and I was curious to know what Mr. Grimm had applied, or what he had done.

Q. Did you discuss with Mr. Grimm what he had done?

A. I did.

Q. Did he tell you what his spray program had been?

A. He did.

Q. On that particular March 18th, did you make

(Testimony of Ashley C. Browne.)

any [286] extensive examination of the trees, foliage, roots, limbs, or any particular part of the orchard? A. Yes, sir.

Q. What did you do, Mr. Browne?

A. Mr. Grimm and I took a shovel and we started in at one end of the Merrill Gems, and as we went through we dug soil to see what the roots looked like. We cut bark in the roots, cut bark on the stems, we cut bark on small limbs, and on twigs. We examined the buds, and by buds I mean both the fruit buds, the little blossom buds, and the wood buds, twig buds that were just beginning to develop, and in some cases had come out a little bit.

Q. What, if any, abnormal condition did you discover?

A. In the roots we found no indication of anything abnormal. In the trunks, and on the major limbs and up to the one year old wood we found a very marked discoloration, sometimes in the cambium layer. We found the outer bark was dark, abnormally dark. In cutting into the cambium we found the areas which should have been flesh clean, light green color, or pearly white, were dark brown and necrotic, highly abnormal, looked as if they had been scalded by some type of spray, or some serious injury.

Q. Did you notice any other abnormality?

A. The buds, the fruit buds and twig buds were in many cases shriveled, or they were cracked; they were discolored [287] dark in color. They lacked the fresh flush of opening buds. They looked almost as

(Testimony of Ashley C. Browne.)

though they had been treated with a dose of hot water, or with an herbicide.

Q. Did you on your next visit to the Grimm ranch, approximately ten days or two weeks later, again examine Mr. Grimm's Merrill Gem peach orchard? A. Yes, sir.

Q. And was the type of examination which you conducted on the second visit approximately two weeks after March 18th about the same as the one that you have described?

A. Yes, very similar.

Q. Did you continue throughout the summer to observe that Merrill Gem peach orchard each time you were on the Grimm ranch?

A. I don't recall a time when I was on there attending to my own work that I didn't before leaving the ranch walk through at least a portion of the Merrill Gems to see what changes, if any, had occurred. It was extremely interesting and I was anxious to see what was taking place.

Q. In these examinations, Mr. Browne, did you detect any sour odor or smell?

A. No, there was neither a sour odor nor was there any accompanying taste to the wood, the bark, other than what would be in ordinary peach wood. It was simply there.

The Reporter: Did you say "it was simply there"? [288]

The Witness: May I ask the last sentence be stricken, it was an incomplete sentence?

(Testimony of Ashley C. Browne.)

Mr. Hamilton: Keep your voice up, Mr. Browne, so everyone can hear you.

The Court: Let's find out and be sure what is being stricken. Read the entire answer, and we will pinpoint it. Read it, Miss Schulke.

(Answer read.)

The Court: You want to strike out "it was simply there"?

The Witness: If you please.

The Court: The statement of the witness "it was simply there" as part of the answer will be stricken and the jury instructed to disregard it.

Mr. Hamilton: Mr. Browne, you understand we are not trying to establish any great literary effort. We want to get at the meat of what you saw before the jury and as rapidly as possible.

Q. Did you see in your inspection — and I am talking now of all of your inspections of the Grimm Merrill Gem peach orchard—any oozing of gum, or gumming of the limbs or branches of those trees?

A. I looked for that characteristic but did not find it at any time during the summer.

Q. Did you see in that orchard the characteristic or symptoms of any disease which you had studied or observed? [289] A. I did not.

Q. Did you, sir, notice any pattern of damage?

A. There was no regular pattern of damage.

Q. Was there any significant amount of injury to one side of the trees as opposed to the other side?

A. Yes, there was.

Q. And what was that pattern?

(Testimony of Ashley C. Browne.)

A. The pattern of damage to the trees was apparently more severe on the west and southwest than on the other side of the trees.

Q. You say the west and the southwest?

A. Yes, south, west and southwest.

Q. And did you mean south and southwest?

Mr. Barnard: I will object to counsel asking him what he meant.

The Court: I think I will sustain the objection. Read the answer.

(Answer read.)

The Court: You stated south, west and southwest; are you talking about three directions?

The Witness: Yes, sir.

The Court: All right.

Q. (By Mr. Hamilton): Mr. Browne, was there any pattern in reference to ages of wood which you discovered? [290] A. Yes, sir.

Q. And what was that pattern?

A. The one-year wood was apparently not injured, or if injured to a very, very slight degree. It was the bark covered wood that had beneath it the dark cambium layer, discolored cambium layer.

Q. In your wide and varied experience, sir, had you observed any other stone fruit orchards which showed symptoms that were similar to those you observed in the Grimm orchard?

A. Yes, sir, I recall seeing an orchard in Santa Clara one time, that is Santa Clara County, one time where an oil had been applied rather late in the year and the prunes on which it was used

(Testimony of Ashley C. Browne.)

showed a similar discoloration of the cambium tissue.

Q. Mr. Browne, do you recall the chemical composition of Mitox?

A. I am sorry to say that is a formula that I don't remember, two compounds, both of which are sulfides, but I don't recall their—one was phenol and one was a—I am sorry, I can't go further than that.

Q. But you are aware that it was sulfides?

A. Yes, sir.

Q. Mr. Browne, is there any inherent danger in using foliage spray oils in conjunction or together with the use of sulphur base insecticides? [291]

A. When oils are prepared for use on foliage, they are made safe by the removal of fractions containing sulphur or which have an affinity for sulphur, and the safety of the oil is in direct proportion to the completeness of the removal of sulphur compounds or sulphur fractions, or the components which have an affinity for sulphur.

Q. Now, if a foliage spray oil is used in combination with sulphur based insecticide, what occurs?

A. Such a combination would result in a re-contamination of the oil to a condition approximating the original untreated base stock.

Q. Would that re-contaminated oil have a toxic or burning effect on foliage and wood?

A. Yes, it does.

Q. Mr. Browne, from your investigation and examination of the Charles Grimm Merrill Gem

(Testimony of Ashley C. Browne.)

peach orchard, and your knowledge of the spray program which he used and the ingredients in that spray, do you have an opinion as to what caused the injury or damage to the Grimm peach orchard? Now, that question can be answered yes or no.

A. Yes.

Q. And what is that opinion?

A. I came to the conclusion that the injury on the Merrill Gem peaches was the result of applying a petroleum oil, which may have been or which was contaminated with sulfides or [292] compounds or sulphur to a degree which no longer made it safe, and I am further convinced that was the case because of the presence in the orchard of 18 other Merrill Gem trees which received no oil whatsoever and which also remain—which do remain in perfectly good condition.

Q. Now, these 18 trees that you refer to, are they in the orchard, or adjacent to it?

A. They are adjacent to it.

Q. Mr. Browne, are you familiar with the magazine called the Western Fruit Grower?

A. Yes, sir.

Q. Is that magazine a respected magazine amongst those engaged in the business of raising and selling fruit? Did you hear me?

A. Will you ask the question again?

Mr. Hamilton: Will you read the question, please?

(Question read.)

A. It is.

(Testimony of Ashley C. Browne.)

Q. Have you had an opportunity to examine the compatability table in the latest issue of the Western Fruit Grower? A. Yes, sir.

Q. According to that compatability table,—what does the word “compatability” mean?

A. In horticultural practice it is taken to mean the [293] compounds may be used safely together.

Q. According to that compatability table, does it indicate that foliage oils, as distinguished from dormant oils, are compatible with Mitox?

Mr. Barnard: To which we object on the ground it is not the best evidence; and secondarily the author of the table would be better evidence than the table itself.

The Court: I am going to sustain the objection to the question.

Mr. Barnard: (Examining document shown by counsel) May I have a minute to look at this, your Honor?

Mr. Hamilton: Would you mark this for identification, sir?

The Clerk: Just this one page?

Mr. Hamilton: You can mark the whole thing.

The Clerk: No. 12.

Q. (By Mr. Hamilton): Mr. Browne, I show you a magazine which indicates on its face that it is the February 1958 issue of the Western Fruit Grower, and on the first page it has the notation “in this issue the 1958 spray compatability chart” and on pages 28 and 29 appears to be a compatabil-

(Testimony of Ashley C. Browne.)

ity chart. Is that the compatability chart that you referred to? A. Yes.

Q. Does that chart indicate that Mitox is compatible in [294] use with dormant spray oil?

The Court: I think, Mr. Hamilton, that the question is not a proper question. We have an expert witness. The expert, of course, may base his ultimate opinion on his own study, his own education, his own research, his own reading in the field, but I don't know of an instance where an article, we will say, in a magazine or a journal which is recognized by the profession is admissible. Now, this is true, that when an expert in his examination states that he has in part at least based his opinion upon a statement appearing in a standard work or in an article by a recognized expert in the field, and if it can be shown that the statement doesn't support his opinion, then of course you can introduce the book or document or paper, but unless counsel wants to educate me more on this subject, I don't think that the magazine is admissible.

Mr. Hamilton: Very well, your Honor, I believe you are fully correct in that regard. I will withdraw the offer of the Western Fruit Grower. It has, however, been marked for identification.

The Court: Do you care to withdraw it?

Mr. Hamilton: I will withdraw it.

The Court: Do you have any objection, Mr. Barnard?

Mr. Barnard: I may want to use it.

The Court: All right. Well, we will leave it

(Testimony of Ashley C. Browne.)

marked [295] for the time being. Do you have any objection to the document in evidence?

Mr. Barnard: Yes, I do, your Honor.

The Court: All right. Let's move along here.

Mr. Hamilton: You may cross examine.

Cross Examination

Q. (By Mr. Barnard): Mr. Browne, you stated that it was your opinion that it would be dangerous to use a combination of oil and a sulphur bearing or a sulphur base material on foliage, because the presence of sulphur would remove the safety of the oil, is that correct?

A. Did you say remove, or reduce?

Q. I believe you stated it would be reduced proportionately to the amount of sulphur, is that your statement? A. Would you repeat that?

The Court: Read the question, Miss Schulke.

(Question read.)

A. Yes, sir.

Q. (By Mr. Barnard): Would that be true regardless of what trees you were going to put that spray on?

A. I believe it would, and particularly in relation to the stage of development or condition, physical condition of the trees at the time of the application. [296]

Q. And what condition would be the worst?

A. I think probably the greatest period of danger to the trees is that time when the cell division is going on at a terrific rate of speed and the buds

(Testimony of Ashley C. Browne.)

are breaking, the tissue is extremely tender at that time.

Q. And would it be true that the more pronounced the breaking of the buds was the greater the danger would be?

A. I think that is correct.

Q. Did you examine Mr. Grimm's Blazing Gold trees at any time during 1957? A. Yes, I did.

Q. Did you see any indication of any similar condition in the Blazing Gold that you saw in the Merrill Gems? A. I did not.

Q. Did you examine the Gold Dust trees?

A. Yes, sir.

Q. And did you find any condition existing there? A. No, sir.

Q. Did you know that the Blazing Gold and the Gold Dust trees had been sprayed with the same compound? A. Mr. Grimm had told me.

Q. Now, it is true, is it not, that what you are referring to when you refer to the removing of the safety of a foliage oil, that you are referring to the addition of what is called elemental sulphur?

A. Not strictly. Elemental sulphur may be one of the factors, but sulphur in other forms may also be a contaminating factor.

Q. Is it your testimony that the sulphur in the form of a compound, as is found in Mitox, which you stated—I beg your pardon, you stated you were not familiar with the formula, did you not?

A. That is right. I couldn't remember the chemical names of the two T compounds.

(Testimony of Ashley C. Browne.)

Q. It is true that in some of those chemical compounds the sulphur loses its characteristics, as such? A. Repeat that, please.

Mr. Barnard: Read the question.

(Question read.)

A. It is.

Q. And so the addition of such a compound to oil would not increase the danger, would it?

A. Oh, I think quite the opposite, if I understand you correctly. Sulphur, or compounds containing sulphur, may recontaminate the unsulfinated fractions in the base oil.

Q. If the compound still retains the characteristic of sulphur, that would be true, is that right?

A. No. A compound containing sulphur, or sulphur combined with other elements, may release the sulphur to the unsatisfied hydrocarbons in the oil.

Q. What is lime sulphur?

A. Lime sulphur is a commonly used fungicide, and sometimes insecticide, based on the combination of sulphur and lime prepared under specific processes.

Q. Have you ever used or recommended the use of a combination of lime and sulphur in cleanup or dormant oil? A. I have not.

Q. You have never done that? All right, now let me ask you one question: You were experimenting in Mr. Grimm's grapes in 1957, is that correct?

A. Yes, sir.

Q. You didn't prior to March 5th or 6th experiment with the Merrill Gem peach trees, did you?

(Testimony of Ashley C. Browne.)

A. No, sir.

Q. Now, have you ever experimented with an oil, that is a light summer oil foliage spray, in an attempt to saturate a peach tree and obtain a killing of the limbs?

A. I have never deliberately done that.

Q. You have not? A. No, sir.

Q. Have you ever experimented with the application of a light or a medium oil upon one year old wood on peach trees and attempted to obtain a saturation? A. I have not.

Q. Sufficient to kill, was the rest of my question. [299] A. I have not.

Q. It is true, is it not, that the one year old wood is more tender than the older wood?

A. That is right. Wait a minute. May I correct that? That is one year old wood is more tender than the older wood?

Q. That is correct.

A. What do you mean by tender?

Q. May I say, more apt to be injured?

A. I don't think I can agree to that.

Q. Well, is it your opinion that it is less apt to be injured?

A. The one year old wood is covered with a wax. It has a glaucous covering, which is a very definite protection. One of the reasons we use splinters in many of the compounds put on peach trees is to get a spreading effect of the insecticide over the glaucous area.

(Testimony of Ashley C. Browne.)

Q. So that it is your opinion that it is more protected than the older wood?

A. It is probably more protected.

Q. Now, in examining the Grimm orchard, you stated that you found neither a sour odor nor a sour taste? A. That is correct.

Q. Is that true for the entire period that you were there, from early March until October?

A. That would hold, that statement would hold until [300] mid summer, when any evidence of fungus disease working in there should have disappeared due to the drying, desiccating atmosphere and the high temperature.

Q. Did you after mid summer notice a sour smell or sour taste?

A. At the time Mr. Grimm was removing the limbs which had died during the summer, I noticed the characteristic odor of fermenting sap, which occurs in any wood that is cut and split and prepared for drying.

Q. During the course of your spring and summer on the Grimm ranch, and your examination of the peach orchard, did you conduct any laboratory tests? A. No, I did not.

Q. Or any tests of that nature?

A. No laboratory tests.

Q. To attempt to determine the cause of the condition?

A. On Mr. Grimm's Merrill Gems?

Q. Yes. A. I did not.

Q. Now, you stated that you saw in the Santa

(Testimony of Ashley C. Browne.)

Clara Valley an orchard of prunes that showed a similar condition. Do you know what oil had been sprayed upon those prunes?

A. As I recall it was cleanup oil quite late in the year. In other words, the buds were about advanced to the point Mr. Grimm's had advanced, growth had actually started. [300]

Q. And by cleanup oil, you mean a comparatively heavy oil manufactured for use on dormant trees?

A. I am sorry, sir, I can't give you the specific gravity of that oil. It was a long time ago, and I don't remember the gravity of the oil. I recall the symptoms that I saw.

Q. It is considered a dormant oil?

A. I believe cleanup oil is considered a dormant oil.

Q. Do you know the percentage of oil that has been applied to those trees?

A. The last part of that question?

Q. The percentage of oil that had been applied to the trees, the prune trees?

A. Again, that was a very long time ago and I can't remember the percentage of oil.

The Court: How long ago was this, Mr. Browne?

The Witness: That was in 1928, about 30 years.

Q. (By Mr. Barnard): Had you seen the orchard sprayed yourself, or were you merely observing the results after someone else told you the condition?

A. About which orchard?

(Testimony of Ashley C. Browne.)

The Court: It is a compound question. I will sustain an objection to it.

Q. (By Mr. Barnard): Referring now to the prune orchard, had you seen it [302] sprayed?

A. I don't recall that I had.

Q. And your knowledge of when it was sprayed and what was sprayed on it is the result of what other people told you?

A. I remember seeing the barrels there in the orchard at the time I went in, but again it is a long time ago and I can't recall the details of the weight of oil, and so forth, percentage used. I do remember the similarity of the cambium symptoms.

Mr. Barnard: May I have just one moment?

That is all.

Mr. Hamilton: I have no questions.

The Court: Will you need Mr. Browne any further?

Mr. Barnard: No.

Mr. Hamilton: No.

The Court: You are excused as far as the Court is concerned.

The Witness: Thank you, sir.

(Witness excused.)

Mr. Hamilton: Your Honor, the plaintiff, except for the right of rebuttal, rests.

The Court: Very well. I think we will take our afternoon recess at this time.

(Admonition to jury, and short recess taken.)

The Court: The jury is present?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: Members of the jury, the plaintiff has completed his main case. Now the procedure is that the defendant presents its case. All right, Mr. Barnard.

Mr. Barnard: If the Court please, I would like to call as my first witness, Mr. Hornkohl, who was here the other day, slightly out of order, and he could then leave. Mr. Hornkohl.

FRANK HORNKOHL

called as a witness by defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Q. (By Mr. Barnard): Mr. Hornkohl, you were sworn the other day, when you were on the stand for a few moments? A. Yes.

Q. And you testified that your name was Frank Hornkohl? A. Yes.

Q. And you are a civil engineer, chemist—chemical engineer, and operate a laboratory in Bakersfield? A. Yes.

Q. In the spring of 1957, you were employed by the California Spray-Chemical Corporation, to make a survey of [304] Mr. Grimm's orchard, is that correct?

A. Not in the spring; it was in August.

Q. In August of 1957, and by whom were you employed?

A. By the manager of the Bakersfield office, manager of the California Spray-Chemical.

(Testimony of Frank Hornkohl.)

Q. Who is that? A. Mr. Fisher.

Q. Mr. Hal Fisher? A. Yes.

Q. What did Mr. Fisher ask you to do?

A. He asked me to go out to Mr. Grimm's ranch, and see if I could make a survey of the damage that was done out there, because it was impossible for his own company to get people on the property, and this way it would be a disinterested report. So I went out to see Mr. Grimm and asked his permission, and at that time I made a preliminary investigation of about the first three rows, and then I reported to Mr. Fisher, and they then asked me to come up to Fresno and look at two or three other orchards where somewhat similar damage had been done, and from that point I went back to Bakersfield and made a complete survey of the entire ten acres of the Merrill Gems, and also an examination of the ten acres of the Blazing Gold and the Gold Dust trees.

Q. Now, Mr. Hornkohl, you made a tree by tree survey [305] of the orchard, did you not?

A. I did, sir.

Q. And then you made a row by row summary?

A. Yes.

Q. And then finally a summary of the entire orchard? A. That is right.

Q. Is that correct? A. Yes.

Q. Now, have you had an opportunity to examine Plaintiff's Exhibit No. 1, which is a summary which was prepared by Mr. Grimm?

A. I have.

(Testimony of Frank Hornkohl.)

Q. And how does the summary which you compiled compare with the summary that is contained on Plaintiff's Exhibit No. 1?

A. Well, I would have it just a little bit different than Mr. Grimm. My first list—the number of trees showing only mite damage, but otherwise fairly healthy, with no dead limbs, is my first category.

Q. How many trees were in that category?

A. I found 396. My second category were the number of trees showing very sparse leaf foliage because of extensive almond mite damage but with no dead limbs, and I found 79.

Then my next—I didn't columnize them—but the total is shown in my report, I just show the number of trees showing dead limb, and I had 207 as compared with Mr. Grimm's of 269. [306] However, if I add the items in No. 2 and this No. 3, that would come to about 286, so it compares very favorably.

Q. May I interrupt just a moment? In other words, if you add the trees which you have specified as being of sparse leaf foliage due to mites——

A. Yes.

Q. ——and those trees upon which you found dead limbs——

A. Yes.

Q. ——those are the trees you meant?

A. Yes.

Q. All right.

A. My next group were the number of dead trees. These also include the ones that have new

(Testimony of Frank Hornkohl.)

shoots from the trunk of the tree proper, and I showed 24 as compared with Mr. Grimm's 22. Then my last item was the number of stunted trees, that is they were shorter than the average trees in the orchard by at least four feet or more, and I counted nine of those.

Q. Nine? A. Yes.

Q. That is your final category? A. Yes.

Q. Of your last category, the nine trees which were four feet or more shorter than the rest, was there any external evidence of any reason for that shortness? [307]

A. Nothing except quite a bit of mite damage, as I recall.

Q. All right, now. You were out there on what day, Mr. Hornkohl?

A. Well, my first—my preliminary examination was made on the 6th of August, and then the tree by tree examination, I believe, started on the 16th of August, and that took three days.

Q. And at that time no dead limbs had been cut from the tree? A. No.

Q. They were all present as far as you could see? A. Yes.

Q. Was it possible for you at that time to determine or to reach a conclusion as to the cause of the condition of the orchard?

A. No, sir, because there was too much time had elapsed from the time that I made my original examination. The only thing I noticed of any consequence was the fact that the dead limbs, about

(Testimony of Frank Hornkohl.)

93 per cent of them, were on the south side. That is the only common thing I found. I did find that the almond mite damage was comparable on all three types of trees; in other words, the leaf drop was about the same. Other than that, why, I couldn't come to any conclusion whether it was a chemical damage or a damage due to disease, or what [308] it might have been.

Q. I take it from part of your last answer that you also examined the Blazing Gold and the Gold Dust trees? A. Yes.

Q. Did you find anything other than the mite damage you have just mentioned on those trees?

A. Other than just a few small twigs were broken, which perhaps—I mean I qualified my report, probably by use of some truck or spray rig that might have knocked them off. There was no damage, no dead limbs at all in the five acres of Blazing Gold or the five acres of Gold Dust.

Mr. Barnard: You may cross examine.

Cross Examination

Q. (By Mr. Hamilton): Mr. Hornkohl, you gave a list of 396 mite damaged trees?

A. 396 as the number of trees showing mite damage, but otherwise fairly healthy, with no dead limbs.

Q. Now, were those all in the Merrill Gems?

A. Yes.

Q. There are no Blazing Gold——

(Testimony of Frank Hornkohl.)

A. This whole compilation is just on the Merrill Gems.

Q. The compilation then as you gave it by numbers—— A. Yes.

Q. ——79 showing almond mite damage? [309]

A. But no dead limbs.

Q. And 207 dead limbs? A. Yes.

Q. And 24 dead trees? A. Yes, sir.

Q. Nine stunted trees? A. Yes.

Q. Those are all Merrill Gems, are they?

A. All Merrill Gems, yes.

Q. When you were there, Mr. Hornkohl, had the orchard been recently sprayed with some chemical to control mites? A. Yes.

Q. I believe in your report you stated that the mite situation was then under control?

A. That is right.

Q. Mr. Hornkohl, I believe you stated in your report that the Merrill Gem is more sensitive to oil and chemical attacks than some other varieties?

A. Yes, I was told that.

Q. You made that statement? A. Yes.

Q. Is it not correct, sir, that the pattern of damage to the southerly exposure of the trees, and I believe you said 93 per cent of the dead material you found was on the south side? [310]

A. Yes.

Q. Doesn't that indicate to you that it was a chemical injury?

A. Well, not necessarily. It could have been a chemical, it could have been any one of a number

(Testimony of Frank Hornkohl.)

of things, but that was the characteristic thing I found at the time, that the damage was, the major part of the damage was on the south side of the trees.

Q. And did you not report to your employer that this strongly indicates a chemical attack of some kind? A. It could have.

Q. You did in fact made that report?

A. I believe I did. Let me check.

Q. Check page 27 of your report, sir.

A. I said it would strongly indicate.

Q. A chemical attack of some kind?

A. Yes.

Q. Did you find any sour odor or smell present? A. No, sir.

Q. Did you find any evidence of gumming or oozing of bacterial matter of any kind?

A. No, sir.

Q. So far as you were concerned, and in your report to your employer, you eliminated the presence of bacterial canker? [311] A. Yes.

Q. You, sir, recommended to your employer that they settle with Mr. Grimm, did you not?

Mr. Barnard: Now, if the Court please, I object to that.

The Court: Yes, I will sustain the objection to that question.

Mr. Barnard: In addition, I would ask the Court to instruct the jury to disregard Mr. Hamilton's remark, or the question.

The Court: Of course, at the proper time, and

(Testimony of Frank Hornkohl.)

I guess the jury already understands it, I will instruct you, but if I sustain an objection to a question, why, you must of course not consider it at all, or speculate as to the answer that might have been given if I had overruled the objection, and base your verdict, of course, entirely upon the evidence which is received and permitted to come before you.

I will instruct you further on that general subject later.

Q. (By Mr. Hamilton): Mr. Hornkohl, the fact that on March 4, 1957, and prior to that time the Charles Grimm Merrill Gem peach orchard was in good or excellent condition, and the fact that on March 5th and 6th it was sprayed with an insecticide mixture, and that at approximately ten days after the spraying evidence of some serious damage or injury was present in that orchard, had substantial significance to you, did it not? [312]

The Court: Well, I think, Mr. Hamilton, those are matters that are properly arguable before a jury at the proper time. I doubt seriously that they are proper questions.

Mr. Hamilton: It was related, your Honor, specifically to portions of Mr. Hornkohl's report.

Q. I ask you, Mr. Hornkohl, what that progression of events and conditions indicated to you?

A. Well, it is definitely a coincidence. However, I didn't make my examination until August, I hadn't seen the property at the time this was

(Testimony of Frank Hornkohl.)

done, so all I could do would be to speculate, Mr. Hamilton.

Q. But what did it indicate to you?

Mr. Barnard: If the Court please, I object to——

The Court: I will sustain the objection to the question.

Mr. Hamilton: I have no further questions.

The Court: Do you have questions, Mr. Barnard?

Mr. Barnard: Just a couple of questions, your Honor.

Redirect Examination

Q. (By Mr. Barnard): Mr. Hornkohl, you stated in answer to one of Mr. Hamilton's questions that you eliminated bacterial canker?

A. As of that time.

Q. As of August 16, 1957? A. Yes.

Q. And the basis of that was the absence of the sourness? [313] A. Yes.

Q. Concerning which you testified?

A. That is right.

Q. On August 16th had the dead limbs on the trees been dead for some time? A. Yes.

Q. And had the trees starting coming back with new shoots? A. Yes.

Q. In your experience, would the sour smell and the oozing of the sap, and so forth, continue after the limb had died? A. No.

Mr. Barnard: That is all.

Mr. Hamilton: No further questions.

The Witness: Am I excused?

(Testimony of Frank Hornkohl.)

The Court: Do you need Mr. Hornkohl further?

Mr. Barnard: No.

The Court: You are excused, Mr. Hornkohl.

The Witness: Thank you.

(Witness excused.)

Mr. Barnard: Mr. Thompson.

ROBERT K. THOMPSON

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please. [314]

The Witness: Robert K. Thompson.

Direct Examination

Q. (By Mr. Barnard): Would you state your full name? A. Robert K. Thompson.

Q. And what is your address?

A. 1914 Ganges Avenue, El Cerrito, California.

Q. By whom are you employed?

A. California Spray-Chemical Corporation.

Q. In what position or capacity?

A. Supervisor of field research for the western division.

Q. How long have you held that position, Mr. Thompson? A. Three years.

Q. And starting back now then, with your schooling, that is advanced schooling, what colleges or universities did you attend?

A. I attended Ohio State University where I received all of my degrees.

Q. Of what?

(Testimony of Robert K. Thompson.)

A. Bachelor of Science in Agriculture, Master of Science and Doctor of Philosophy.

Q. And has your specialty at all times been in agriculture? A. It has.

Q. Any particular field? [315]

A. Entomology particularly.

Q. Prior to your employment by the California Spray-Chemical Corporation, did you have any other employment?

A. I have had concurrent with the schooling employment by United States Department of Agriculture.

Q. In the field of entomology? A. Yes.

Q. Now, in your capacity with Cal-Spray, Mr. Thompson, will you explain to the jury just what your department does?

A. My department, which is research and development, is responsible for the testing of new materials which may be developed in our own chemical laboratory, or which may appear on the market from many sources, or which may be brought to us by other companies. We are responsible for evaluating these new chemicals for developing the proper use recommendations, and give these recommendations to, first, our marketing department, and as requested to customers or dealers.

Q. And does that research include inquiries into the dangers of various chemicals, as well as to their values? A. It does.

Q. Are you familiar with a compound marketed by Cal-Spray under the name of Mitox?

(Testimony of Robert K. Thompson.)

A. Yes.

Q. And can you give us the formula for Mitox?

A. Yes, sir. The formula is para-chlorobenzyl, para-chlorophenyl sulfide.

Q. Were any experiments in connection with Mitox conducted by your department under your direction? A. Yes, sir.

Q. And over what period of time?

A. Under my own direction since 1955; that is not the earliest date Cal-Spray tested it.

Q. Do I understand then, in other words, that it has been under your direction since you have been with the company, but that experiments were being conducted prior to your association with the company?

A. I was associated with the company prior to this time in other capacities. I have only been associated with the development of Mitox the past three years that I have held this latest position.

Q. I see. Can you tell us generally what experiments were conducted with Mitox?

A. Experiments were conducted to test the efficiency of Mitox to control mites of different types, mainly those known as red spider mites. This is done by comparing it to other known effective miticides at different dosages. Tests were conducted using Mitox in combination with other materials commonly used on trees of various types to show how Mitox might be used in the regular spray program, and tests have [317] been run on all types of fruit trees and other crops at various dosages

(Testimony of Robert K. Thompson.)

to determine its limits of safety, or vital toxicity, that is whether or not it would injure crops.

Q. And after the completion of those tests—withdraw that. Were those tests conducted by you and your department prior to Mitox being placed on the market? A. They were.

Q. After the completion of those tests was Mitox placed on the market for general sale?

A. General sale in the sense that as far as it was available. In other words, there were limitations to manufacturing.

Q. In other words, there wasn't enough?

A. That is right.

Q. But insofar as there was a supply in 1957, was Mitox on general sale by Cal-Spray, as one of its products? A. Yes.

Q. I will show you, Mr. Thompson, Plaintiff's Exhibit 2, and call your attention to the fact that on Plaintiff's Exhibit 2 is the statement "for experimental sale". Can you explain to us what that term means, or meant on that invoice?

A. Experimental sale is a requirement of the United States Department of Agriculture on a new product until such time that they and the Food and Drug Administration are [318] satisfied concerning the possible toxicity of residue that may remain from the use of the chemical on the food crop. In other words, in registering a chemical for sale, and all agricultural chemicals must be registered with the United States Department of Agriculture, they require, first, that you prove its effec-

(Testimony of Robert K. Thompson.)

tiveness to control the insects which are mentioned on the label; secondly, they require that you show if the compound is safe to man in the levels which may remain on the food crops. Generally this is a quite lengthy process of doing the toxicology work as determining the toxicity of the compound and determining chemically what residue of the chemical remains on the food crop. But as this study progresses the United States Department of Agriculture and the Food and Drug Administration may give a registration on "experimental sale", which means that to the best of their knowledge the material is safe, that you can start selling it, and that pending completion of these toxicity studies it is fully registered.

Q. Could it be said, in other words, that this amounts of a temporary registration?

A. In a sense, it is——

Mr. Hamilton: I will object to the question.

The Court: I will sustain the objection. The witness has explained it. [319]

Q. (By Mr. Barnard): Under the conditions that you have described, Mr. Thompson, is it required that the note be made on a sales invoice?

A. Yes, sir, it is a legal requirement.

Q. And that you say is a legal requirement?

A. Yes.

Q. Has the compound known as Mitox received its permanent registration? A. It has, yes.

Q. So that in a sale made at this time it would not be necessary to make such a note on the in-

(Testimony of Robert K. Thompson.)

voice? A. It is not so necessary.

Q. Mr. Thompson, are you familiar with whether or not Mitox is compatible with Ortho-K medium oil? A. Yes, sir, it is compatible.

Q. Is there anything in the compound Mitox which when combined with Ortho-K medium oil would cause any danger whatsoever?

A. Assuming that we are talking about peaches, no.

Q. Mr. Thompson, is a formula containing two pounds of Mitox, four per cent medium oil, and two pounds of lead arsenate per 100 gallons of water sprayed on peach trees at the rate of 260 gallons per acre a safe formula?

A. To the best of my knowledge, that is safe.

Q. Would that be true in the pink bud stage?

A. Yes, sir.

Q. Now, at my request, Mr. Thompson, you have brought two bottles of oil. Are they both the same?

A. They are the same.

Mr. Barnard: They should both be marked. Would you mark that as Defendant's exhibit.

(The bottles referred to were marked as Defendant's Exhibits B and C, for identification.)

Q. Mr. Thompson, I will show you a bottle, which has been marked Defendant's Exhibit B, and——

The Court: For identification.

Q. (By Mr. Barnard): ——for identification, and can you tell us what is in that bottle?

A. This is the stock oil, the pure oil, that is

(Testimony of Robert K. Thompson.)

used to make Ortho-K flowable, and other oil products.

Q. And to that stock oil what else is added to make Ortho-K flowable medium oil?

A. Ortho-K is made with the oil; it contains emulsifying agents which are in general terms soaps or detergents. It contains conditioned agents to bind the detergent with oil, make it stable; and it contains a small amount of casease which is also involved with the emulsification. It contains water, that is the flowable formula contains about [321] 16 per cent water.

Q. What per cent of the final product, Ortho-K medium flowable oil, is the oil contained in Defendant's Exhibit B for identification?

A. 83 per cent of the final product is this oil.

Mr. Barnard: I offer this as Defendant's Exhibit B.

Mr. Hamilton: No objection.

The Court: It will be received and so marked.

(The bottle heretofore marked for identification as Defendant's Exhibit B, was received in evidence.)

Mr. Barnard: May I pass it to the jury, your Honor? (Handing to jury.)

Would the Court prefer to go ahead? I think we can.

The Court: I think you can go ahead.

Q. (By Mr. Barnard): Mr. Thompson, I have handed you another bottle which is marked De-

(Testimony of Robert K. Thompson.)

fendant's Exhibit C for identification. Can you tell me what that contains?

A. This contains the Ortho-K medium flowable, the final product as used by the growers.

Q. As used by the growers. And that contains approximately 85 per cent of the oil represented by Defendant's Exhibit B and the other ingredients which you have just mentioned?

A. 83 per cent of the oil, and water and the emulsifiers as mentioned. [322]

The Court: You offer that?

Mr. Barnard: Oh, I beg your pardon. I offer that.

Mr. Hamilton: No objection.

The Court: Is this the product which the user mixes with the water, the 100 gallons?

The Witness: Yes, sir, this is the product that is used as has been referred to as four per cent, meaning four gallons of this product in 100 gallons of water.

The Court: It will be received and marked Defendant's Exhibit C.

(The bottle heretofore marked for identification as Defendant's Exhibit C, was received in evidence.)

Q. (By Mr. Barnard): Mr. Thompson, are you familiar with a product known as clean-up oil?

A. Yes, sir.

Q. Is clean-up oil a lighter oil, or a heavier oil than the oil represented by Defendant's Exhibit B?

A. Clean-up oil is a heavier oil.

(Testimony of Robert K. Thompson.)

Q. Explain what you mean by heavier?

A. By heavier oil, it can have several meanings. One would relate to viscosity, in other words, the ease of flow, or the part of the chemical constitution. It also involves the purity of the oil, in other words, in general a cruder oil is considered a heavier oil, and a more highly refined oil [323] a lighter oil.

Q. Have you had experience with the use of Ortho-K medium flowable oil on plant foliage?

A. Yes, sir.

Q. Is it safe to use on plant foliage?

A. Yes, sir.

Q. Would it be safe to use four per cent on plant foliage?

A. It depends specifically on the plant and the time of application.

Q. Would it be safe to use on peach trees?

A. Yes, sir.

Q. In the pink bud stage?

A. Yes, sir.

Q. What effect would you observe if such an oil as Ortho-K medium flowable oil was used at the wrong time?

A. The effect then would be first noticed as a difference in color of the leaves, that is from a dark green it would progressively turn lighter green. In an extreme case, which I have not seen with this particular oil, but with other oils, it goes from the light green to a yellowish green.

Q. And then eventually does the leaf die?

(Testimony of Robert K. Thompson.)

A. Eventually it would not die on the tree; eventually it may drop, which is equivalent to death, I suppose.

Q. Could Ortho-K medium flowable oil result in killing [324] of the major limbs of a peach tree?

A. In my opinion it could not so result.

Mr. Barnard: You may cross examine.

Cross Examination

Q. (By Mr. Hamilton): Did I understand you correctly, sir, to state that you were employed by the United States Department of Agriculture at the same time you were attending school?

A. Yes, sir.

Q. Now, you stated that you conducted experiments with the use of chemicals, agricultural chemicals, on all kinds of vegetables, plants, including trees. Now, let's narrow that down.

The Court: Now, was that a question?

Mr. Hamilton: No, it was a statement.

The Court: Well, is that statement correct?

The Witness: I am not certain I said "all", but in essence I implied that.

The Court: All right.

Mr. Hamilton: Thank you.

Q. Narrowing it down to the use of oils on stone fruits, how many experiments have you conducted personally using oils on stone fruit trees?

A. By personally, you mean under my direction?

Q. Yes. [325]

(Testimony of Robert K. Thompson.)

A. I would say it would be in the range of 40 to 50.

Q. Where?

A. Throughout California, New Jersey, New York, Ohio, Washington and Oregon.

Q. Now, describe these experiments.

A. In these experiments, generally they are applied by a power sprayer, that is a sprayer driven with some type of combustion engine, which operates a high pressure pump. This pump forces the spray through the hose and a nozzle to form a mist over the tree. This is directed at the tree, wetting the tree with the spray, and this is done by certain, what we call scientific methods, that is, we divide a plot of trees up. It may be any size plot, for example, ten trees, to ten acres, and there will be different treatments applied to different trees in that plot, and all the trees receiving the same treatment will not be together, but will be scattered throughout the plot, so that you can get an average experience over the area treated, and so it enables you to make comparisons between your treatments. Sometimes these treatments involve the comparison of materials, sometimes the comparison of different dosages of the same material, and similar comparisons to that.

Q. Now, what is the critical range in percentage of oil applied to stone fruits at which point damage will appear?

A. Damage in the form as I described, as the lightening [326] of the chlorophyll or the green

(Testimony of Robert K. Thompson.)

color could appear at different dosages depending on the soil moisture, the type of soil, the temperature, the stage of tree growth, most every orchard you go into would be different. It is difficult to draw generalizations. However, to try to do so and answer your question, you might generalize that with the particular oil involved here, Ortho-K, which is known as a summer oil, or one of the more highly refined, that we have known trees to be sprayed at ten per cent without injury; we have known trees to be sprayed at 40 per cent without injury; and yet at the same dosages at other places and under other conditions they might show injury.

Q. In other words, it is a factor that is so variable no absolute rule can be laid down?

A. No absolute rule, that is right, with this type of oil.

Q. Do you have an experimental stone fruit plot or orchard in California?

A. In the sense that we own such a plot, no.

Q. Have you personally conducted experiments on stone fruits in California? A. Yes, sir.

Q. Where?

A. This is done with the cooperation of many growers. It has been done here in Fresno, in the Sacramento area, Yuba [327] City.

Q. Let's limit it to Fresno. What grower?

A. I do not recall specifically the names of those growers. This was done by men under my direction.

Q. You are familiar with the Western Fruit

(Testimony of Robert K. Thompson.)

Grower, are you not? A. Yes, sir.

Q. Is the compatibility table published annually by the Western Fruit Grower an authoritative table?

A. To a certain extent it is authoritative. I think that the authors are sincere in their efforts, although they might not be completely correct in all statements given therein.

Q. Have you reviewed the 1958 Western Fruit Grower compatibility table? A. Yes.

Q. It appears in that table, does it not, that Mitox and the dormant oils are compatible?

A. Yes, sir.

Q. But it does not appear that Mitox and foliage spray oils are compatible, is that correct?

A. Yes, sir.

Q. To your company, wouldn't it be a valuable thing to have it appear that Mitox and foliage oil were compatible?

A. It would be valuable, but impossible. Mitox is not [328] registered for use in a foliage spray.

Q. Because it is not compatible?

A. No, sir, absolutely not.

Q. What, sir, if you can explain to me in simple language that I can understand, is the difference between your—and by your, I mean California Spray-Chemical Company's—clean-up oil and its Ortho-K oil?

A. The main difference between clean-up oil and Ortho-K is in the degree of refinement.

(Testimony of Robert K. Thompson.)

Q. The base oil is the same, is that correct?

A. The base oil is——

Q. Stock oil, let's call it.

A. No, sir. It is the same only when it comes out of the ground as crude oil. From then on it goes through different processes of refinement, and Ortho-K is carried farther in the degree of refinement.

Q. And in that refinement what is attempted to be done by the refiner?

A. In the refinement they remove various fractions, such as kerosene, gasoline, lube oils, asphalt, and one of these fractions is spray oil.

Q. Isn't one of the purposes of additional refinement to remove sulfur from the oil?

A. No, the sulfur isn't removed by the refinement. The sulfur in crude oil is sedimental and is removed by [329] filtration, not through refinement.

Q. In any event, the process that your Ortho-K oils go through, the more highly refined oil has more sulfur removed from the oil than your clean-up oil, is that not correct?

A. I do not think so because the sulfur is removed before this treatment, the difference in the treatment.

Q. Is it not, sir, correct that one of the important tests to determine whether an oil should be used as a dormant oil or as a foliage oil is to ascertain the amount of unsulfinated residuals?

A. Yes, sir.

(Testimony of Robert K. Thompson.)

Q. And that unsulfinated residual means residual without the sulfur molecules, does it not?

A. No, sir.

Q. What does it mean?

A. Unsulfinated residue means that fractions of certain compounds in there which are injurious, which do not react to sulphuric acid, that the more highly refined oils are more highly treated with sulphuric acid, and you are actually adding sulfur to react with other compounds in the oil so that they may be drawn off in a later filtration.

Q. And that deprives those other compounds of sulfur, does it not?

A. In general, these other compounds are not sulfur [330] compounds.

Q. Sir, is there any danger in using a foliage oil in conjunction with sulfur? A. Yes, sir.

Q. Those two agricultural chemicals are not compatible? A. That is right.

Q. But there is no danger in using sulfur with a dormant oil, is there?

A. No practical danger.

Q. Those two are compatible?

A. There is a difference in compatibility.

Q. Mitox has some sulfur in it, does it not?

A. Yes, sir.

Q. The invoices setting forth the sale of Mitox to Charles W. Grimm were marked "experimental sales" for the reason that Mitox had not been approved by the United States Department of Agriculture, is that correct?

(Testimony of Robert K. Thompson.)

A. No, sir, it is not correct.

Q. I wonder if you would explain that again, why it had to be marked "experimental sale" if it was not because it had not been approved by the United States Department of Agriculture?

A. Well, it had been approved for sale by the United States Department of Agriculture, but was required to be marked "for experimental sale" because that status of the [331] toxicity tests were—well, they were incomplete. In other words, the minimum requirement on this type of compound is a two-year study. Many times it takes longer than that, and our two-year period was not up, but it was far enough along that the data was acceptable for the approval of the product for a one-year period, because experimental sales registration lasts for just one year. At the end of that time then you obtain the complete registration or approval.

Mr. Hamilton: I have no further questions.

Redirect Examination

Q. (By Mr. Barnard): Mr. Thompson, these toxicity studies to which you just referred, are they studies as to the effect on human beings, or on trees?

A. Very rarely on human beings; most often on rats and dogs.

Q. What I meant is, are they studies as to the effect of residue which might be left on the fruit?

A. Yes, it is studies to try to learn what such effect would be.

(Testimony of Robert K. Thompson.)

Q. Now, referring to the Western Fruit Grower, to which Mr. Hamilton called your attention——

A. Yes.

Q. The compatibility chart, does that chart show that Mitox is not compatible with summer oil?

A. No, sir.

Q. Is it? A. It is.

Q. Is Ortho-K medium flowable oil a new product? A. No, sir, a very old product.

Q. Approximately how long has it been on the market, have you any idea? A. About 30 years.

Mr. Barnard: That is all.

Mr. Hamilton: No questions, your Honor.

Mr. Barnard: May Mr. Thompson be excused?

Mr. Hamilton: He may be excused.

The Court: You are excused as far as the Court is concerned, Doctor. The next witness?

(Witness excused.)

Mr. Barnard: Mr. Hanna.

JOHN LINDSAY TIMOTHY HANNA

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: J. L. Timothy Hanna.

Direct Examination

Q. (By Mr. Barnard): Would you state your full name, please?

A. John Lindsay Timothy Hanna. [333]

Q. And where do you live, Mr. Hanna?

(Testimony of John Lindsay Timothy Hanna.)

A. Bakersfield, California.

Q. What is your business or occupation?

A. I am an agricultural consultant.

Q. Independent? A. Independent, yes.

Q. In 1957 what was your business or occupation?

A. I was employed by Cal-Spray as field representative, sales representative in the field.

Q. In what area? A. Wheeler Ridge.

Q. That is in Kern County, is it?

A. Southern part of Kern County.

Q. How long had you been so employed?

A. I think a little over four years, as of March 1, 1958.

Q. And in all of that time were you employed as a field representative? A. Yes, sir.

Q. Generally what are the duties of a field representative?

A. To check growers' crops and advise them on insect population, identification, and type of material to use for eradication.

Q. And in connection with that occupation did you become acquainted with Mr. Charles Grimm?

A. Yes, sir.

Q. About how long ago did you first meet him?

A. A little over three years ago, I believe.

Q. Did you see him then from time to time after that? A. Yes, sir.

Q. Are you familiar with Mr. Grimm's peach orchard, in the Wheeler Ridge area of Kern County? A. Yes, I am.

(Testimony of John Lindsay Timothy Hanna.)

Q. And have you visited that ranch on many occasions? A. Yes.

Q. Did you in connection with your employment as a field representative by Cal-Spray make periodic visits to Mr. Grimm's ranch? A. Yes, I did.

Q. About how often did you go there?

A. I think my average calling on Mr. Grimm would be twice a week perhaps, sometimes oftener in different seasons than in other seasons.

Q. Referring to the months of December of 1956 and January of 1957, did you visit Mr. Grimm's orchard? A. Yes, sir.

Q. And did you make an examination of the orchard?

A. Yes, I did. I believe that to be in January.

Q. Of 1957? A. '57, yes, sir. [335]

Q. Is that as close as you can come to the actual date?

A. Yes. I don't remember; that is so long ago I have forgotten exactly when it was.

Q. Did you at that time examine his orchard?

A. I did, yes.

Q. And what was the purpose of your examination?

A. Well, actually it was a periodic examination, part of my duties with Cal-Spray, but I was looking for deposits of spider mite eggs, any scales that might be present on the trees, or any other insects, general condition of the orchard and the vineyard.

Q. Did you find any evidence of spider mites and scale? A. Yes, sir.

(Testimony of John Lindsay Timothy Hanna.)

Q. This is in this examination some time in the month of January?

A. It was, I believe, in the first part, first half of January I would say would be safe.

Q. Did you thereafter have a conversation with Mr. Grimm about what you found? A. Yes.

Q. And can you tell us generally what that conversation was?

A. I advised Mr. Grimm that I found a relatively heavy deposit of spider mite eggs and I had found slight indications of scale population spotted throughout his orchard. [336]

Q. And was that in the Merrill Gem Peaches?

A. That was in all the peaches.

Q. Merrill Gems, the Blazing Gold and the Gold Dust? A. Yes, sir.

Q. Did you at that time recommend a course of treatment to Mr. Grimm?

A. No, I did not at that time.

Q. Did you go back then later to his orchard?

A. Yes.

Q. And approximately when was that?

A. I believe, if I am not mistaken, I made two trips to that orchard in the latter part of January, and I made four or five trips in February.

Q. Did you at any one of those trips recommend a course of treatment to Mr. Grimm?

A. Yes, I did.

Q. Can you tell us approximately when that was?

(Testimony of John Lindsay Timothy Hanna.)

A. I think I first—I made my first recommendation to Mr. Grimm in the latter part of January or the first part of February of 1957.

Q. Do you recall what you recommended?

A. Yes, I do.

Q. And what was it?

A. I recommended that he spray his orchard with four per cent Ortho-K medium oil per 100 gallons of water, and [337] that would be four gallons per 100 gallons, and four pounds of basic lead arsenate, two pounds of Ortho Mitox; that was all to go in 100 gallons of water, and I recommended that he use 400 gallons to the acre to get coverage of the trees.

Q. Did Mr. Grimm say anything to you at that time?

A. Well, he said he didn't like the idea of the oil.

Q. What did you say, or what did you do?

A. I would like it for the record, this was not my basic recommendation. I was repeating a recommendation given to me.

Q. In other words, in between some of these visits had you obtained a recommendation from someone else, is that what you mean?

A. Yes, would you care for me to explain that?

Q. Yes, please.

A. Mr. Harold Fisher, who is the branch manager of the Bakersfield branch of the Cal-Spray had come from a peach growing and producing

(Testimony of John Lindsay Timothy Hanna.)

area, and I respected his advice on peach trees, recommendations, because I was more familiar with field crops. I contacted him, Mr. Fisher that is, and told him of my findings on Mr. Grimm's orchard, and consulted with him on a recommendation, which he gave me, and which I passed along to Mr. Grimm.

Q. I see. Then when Mr. Grimm objected to the oil, did you discuss that objection with Mr. Fisher? [338]

A. I believe that I talked to Mr. Fisher on the radio at Mr. Grimm's ranch.

Q. I see. And as a result of these conversations was certain material delivered to Mr. Grimm's ranch for spraying? A. That is correct.

Q. And that, as has been testified to and is admitted, was the formula which you have just described?

A. That is correct. They delivered the material at my request to the ranch.

Q. Now, were you present when the material was being sprayed?

A. I checked the spraying as it was going on. I wasn't there the whole time.

Q. And that was on March 5th and 6th?

A. 5th and 6th, I believe.

Q. Of 1957? A. Correct.

Q. What was the next thing that you knew or heard of concerning Mr. Grimm's orchard?

A. Well, Mr. Grimm called me, I believe it was

(Testimony of John Lindsay Timothy Hanna.)

in the neighborhood of a week later, and asked me to come out and check some of his peach trees that—check and report to him what my findings were, which I did.

Q. And what did you find?

A. I found some bloom shedding in the Blazing Gold, I [339] believe, and also some pistil burn, which I reported to Mr. Grimm.

Q. Did you find anything else at that time?

A. No, sir.

Q. Did you later hear from Mr. Grimm again?

A. I checked back myself some time later, to re-check these peach trees I just mentioned that had a slight, oh, burn I guess, from the oil, and to re-check to see how it was progressing.

Q. First, approximately how long after your first visit was the second visit?

A. Within—well, I would imagine it would have been within a couple of days.

Q. Is that your best estimate at this time?

A. Yes. I don't exactly remember the time.

Q. And what did you find as far as the Blazing Gold and the Gold Dust trees were concerned, on your second visit?

A. Oh, about the same condition. It didn't look to me like it was getting any worse, and I reported to Mr. Grimm that I wasn't too concerned about it. And then I spotted a tree in the other orchard, which would be the Merrill Gems, one isolated tree out there, and I called Mr. Grimm out to observe it.

Q. Where was that tree in the orchard?

(Testimony of John Lindsay Timothy Hanna.)

A. This is an approximation, it was four or five trees [340] in from the east side of the orchard, and I would guess maybe 10 to 12 trees north from the south side of the orchard, cornering it that way.

Q. All right. Now, will you describe the condition that you found in that tree?

A. Yes. The tree looked awfully sick, it was withering up somewhat, and at first to me I thought it was an economic problem, that is, it needed plant food, fertilizer. And the tree looked rather—well, it looked awfully sick, so I recommended to Mr. Grimm that I give him some leaf feed to put on that tree to see if we could snap it out of it.

Q. And did you do so?

A. I gave him some material, and I don't believe he used it.

Q. All right. Did you go back to his orchard then at a later date? A. Yes, I did.

Q. About how long was it?

A. If I remember correctly, it was about a week later that Mr. Grimm requested me to come out to the orchard again.

Q. What did you find at that time?

A. I found several sick trees in the Gem variety.

Q. What visual evidence did you see?

A. The leaves were discolored, what little there was—you know, at that time of year—and shriveling, the branches [341] were drooping. I dug into the tree with my knife to investigate, and it has been stated, the cambium layer was dark. They looked

(Testimony of John Lindsay Timothy Hanna.)
in a very unhealthy state, very sick, and I didn't like it.

Q. Now, Mr. Hanna, in order to conserve time, may I ask you if you were in the court room and heard Mr. Grimm testify concerning the spreading of this condition through the orchard?

A. I heard Mr. Grimm's testimony, yes, sir.

Q. And did you visit that orchard from time to time again later in the spring?

A. Yes, I visited the orchard very often.

Q. Did the spreading condition occur substantially as Mr. Grimm explained, testified it did?

A. That is correct.

Q. Now, also in the late summer, did the improvement in the trees occur as Mr. Grimm testified?

A. Qualify late summer for me, please, Mr. Barnard.

Q. Well, say in September?

A. September? I think there was an improvement there in September.

Q. All right. Now, what did you do, Mr. Hanna, after you discovered this condition more or less prevalent in the orchard?

A. I contacted Mr. Hal Fisher and requested that he [342] and/or Dr. Sessions accompany me out to the orchard to look at it with me as soon as possible.

Q. And did you go out there with Mr. Fisher and Dr. Sessions at a later date? A. Yes, I did.

(Testimony of John Lindsay Timothy Hanna.)

Q. About how long later was that?

A. I think it was a couple of days.

Q. What did you do?

A. Well, I didn't know what the trouble was there, and I asked them to help me.

Q. I mean, physically what did you do?

A. Oh, physically; I beg your pardon. We inspected the wood with knives, peeling it back. We walked through most of the orchard, made visual inspection of all angles of the tree, the sides and tops, and I believe we dug some dirt around some of the roots to inspect it, and asked Mr. Grimm what his cultural practices had been, what his economic practices had been, his irrigation. That is about it.

Q. Did you personally conduct any laboratory tests, or tests of any kind? A. No, I did not.

Q. Did you follow the Grimm orchard then through the balance of the year?

A. I did, yes. I would like to qualify that; during the summertime I am awfully busy and I did not call regularly [343] to observe the orchard, but every time I was in that very close vicinity I would go and look at it.

Q. Did you continue your investigation to determine the cause of the condition, or did you leave that up to other employees of your company?

A. I left that up to the more qualified personnel of the company.

Mr. Barnard: I have no further questions.

(Testimony of John Lindsay Timothy Hanna.)

Cross Examination

Q. (By Mr. Hamilton): Mr. Hanna, you referred to a conversation between you and Mr. Grimm, in which Mr. Grimm raised an objection to the use of four per cent oil in the spray that you had recommended. A. Yes.

Q. Do you recall referring to that conversation?

A. Yes, I do.

Q. Then immediately afterwards you said you talked to Mr. Fisher on the radio. What did you mean?

A. I contacted—we have two-way radios in the cars.

Q. You had a two-way radio in your car?

A. Yes, sir.

Q. So you could immediately, if you wanted to talk to Mr. Fisher, pick up the receiver in your car and contact him?

A. Yes. Normally it is for the office calls for people [344] trying to get ahold of us, they would get us on the radio and we would get there much more quickly.

Q. So while you were discussing this percentage of oil with Mr. Grimm, you contacted Mr. Fisher and obtained his further approval of your four per cent solution? A. That is correct.

Q. When Dr. Sessions came down, Mr. Hanna, did you go to the Grimm orchard with Dr. Sessions the first time? A. Yes, I did.

Q. Who else was with you?

(Testimony of John Lindsay Timothy Hanna.)

A. Mr. Fisher.

Q. And did you assist Mr. Fisher and Dr. Sessions in their examination of the orchard?

A. Yes, I did.

Q. And do you know how many times Dr. Sessions visited the Grimm orchard for the purpose of examining it?

A. On two occasions, Mr. Hamilton, I was with him, and I believe to the best of my knowledge he was there once more when I wasn't present.

Q. On the second occasion when you were with Dr. Sessions at the Grimm orchard, did you assist him in his investigation of the orchard?

A. You confuse me a little on the word "assist". I was just walking along listening, because I didn't have any idea what was wrong. [345]

Q. You were just along listening. You didn't gather material for him?

A. Not on the second time, no. No, that—he requested me to do some work for him at a later date, which I later did.

Q. Was that in connection with the Grimm orchard? A. Yes, it was.

Q. And what was that?

A. He requested me to take a soil profile 12 feet deep every six inches, and take in to the laboratory and have a soil analysis performed and give him the analysis, which I did.

Q. So in answer to counsel's question about having performed no laboratory tests, you meant no

(Testimony of John Lindsay Timothy Hanna.)

laboratory tests by yourself personally, is that correct?

A. Yes, that is what I thought he meant.

Q. But you did gather some material, that is to say, you got an auger and dug into the earth in the Grimm peach orchard, down to a depth of 12 feet, is that correct?

A. Well, I really went to 13 feet 2 inches, or something, but I took what Dr. Sessions requested me to do, and took all the cores into the——

Q. Took cores from that——

A. Profile, yes, and took it into the lab and they ran the tests themselves in there.

Q. Mr. Hanna, you have referred to seeing one sick tree in the Grimm orchard, and I believe you were the first [346] person that noticed that tree.

A. To the best of my knowledge, I pointed out——

Q. You called Mr. Grimm's attention to it?

A. That is correct, yes.

Q. Was the foliage on that tree yellowish in appearance?

A. It appeared to be very chlorotic, yellowish.

Q. It was a lighter color than a normal healthy tree should be?

A. That is correct.

Q. And by chlorotic you mean yellowish?

A. That is correct.

Q. Now, at a later time you noticed that sickness appear to spread over the orchard, is that correct?

(Testimony of John Lindsay Timothy Hanna.)

A. Yes—I wasn't the first to notice that, but I noticed it.

Q. No, but you noticed it? A. Yes.

Q. And in the balance of the orchard, the foliage would turn a light green or a chlorotic color?

A. To the best of my recollection you are correct, yes.

Q. Thank you. Now, you stated you would visit the Grimm ranch about two times a week, is that correct? A. Yes, sir.

Q. Did that also apply to the summer periods?

A. When I was enjoying Mr. Grimm's account business [347] it applies to the summer period as well, yes, sir.

Q. Now, those trips to the Grimm ranch, they were for business purposes, were they not?

A. Yes, certainly.

Q. You were trying to sell him agricultural chemicals for the benefit of yourself and Cal-Spray?

A. Plus trying to do a good job taking care of his fields, vines, trees, cotton.

Q. At any time, either before or after this injury occurred to Mr. Grimm's orchard, has Mr. Grimm refused to allow you to come on the orchard and make any examination you desired to make?

A. Very definitely not; he has been very co-operative.

Q. Do you know of any instance in which Mr. Grimm refused to allow any Cal-Spray employee to come on his ranch and investigate?

(Testimony of John Lindsay Timothy Hanna.)

A. I believe there was one instance I heard about.

Q. And what was that?

A. I believe that Mr. Grimm refused to let Mr. Fisher take some stumps out, something of that sort, that nature.

Q. But that is the only instance you have heard of?

A. That is the only one I know of, yes.

Mr. Hamilton: I have no further questions.

The Court: You are through with this witness, Mr. Barnard?

Mr. Barnard: Yes. [348]

The Court: You are excused.

Mr. Hamilton: Your Honor, I should like to have this witness instructed to stay.

The Court: All right. Well, you are not excused.

(Witness temporarily excused.)

The Court: Members of the jury, we will reconvene tomorrow morning at 9:30. I have another group coming in to be selected for the jury in another case, so we will reconvene in this case at 10:00 o'clock tomorrow morning. [349]

(Admonition to jury and recess at 4:30 p.m. until 10:00 a.m., April 11, 1958.)

Friday, April 11, 1958. 10:00 A.M.

The Court: Do counsel stipulate the presence of the jury?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: Next witness?

Mr. Barnard: Mr. Ogden.

GEORGE W. OGDEN

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: George W. Ogden.

The Clerk: Have that seat.

Direct Examination

Q. (By Mr. Barnard): Mr. Ogden, would you state your full name, please?

A. George W. Ogden.

Q. And where do you live?

A. 4609 North Flower Avenue, Clovis.

The Court: Mr. Ogden, I am going to ask you to keep your voice up, so everybody can hear you.

Q. (By Mr. Barnard): What is your business, Mr. Ogden? A. Farming.

Q. And how many acres do you farm? [352]

A. Sixty.

Q. And is that located at your home, the address of which you have just given us?

A. It is.

Q. What type of crops do you raise?

A. Peaches and grapes.

Q. How many acres of peach trees do you have?

A. Close to 20.

Q. And referring to the year 1957, if there has been any change, what varieties of peaches did you grow?

(Testimony of George W. Odgen.)

A. Kim Alberta and Gold Dust, Blazing Gold and Red Haven.

Q. Do you know what root stock those trees were grown on?

A. The Gold Dust, Blazing Gold, Red Haven are on S-37 stock, and the Kim Alberta is on Lovell, I think. They were planted before I bought the place.

Q. How old are the trees in your orchard, by varieties if necessary?

A. I planted the Gold Dust in 1951, and planted the Red Haven in 1954, and the Blazing Gold in 1955, and the Kim Albertas were planted, I believe, in 1945. They were planted by the previous owner.

Q. I see. Now, in the year 1957 did any unusual condition develop or exist in your peach orchard?

A. Yes, the trees budded out and on quite a lot of them the buds turned brown shortly after the leaf buds opened, [353] and parts of the trees began dying, some of them died entirely, and some of them were only part, a limb here and there.

Q. Did that condition continue throughout the growing season?

Mr. Hamilton: Your Honor, I am going to object to this line of questioning to this witness, on the basis that we are concerned in this action with a Merrill Gem peach orchard. This witness has indicated that he has no Merrill Gem peach orchard on his ranch. The similarity, I do not believe, is

(Testimony of George W. Odgen.)

sufficiently established for this material to have any relevancy here.

Mr. Barnard: If the Court please, it seems to me that is a matter of weight of the evidence. Counsel has insisted at various times throughout the trial that the Merrill Gem is a relatively new peach, there aren't very many orchards containing the peach. The evidence from other witnesses has been to the effect that the Merrill Gems were perhaps more susceptible to certain diseases, but not that other varieties do not suffer the same diseases. I believe it is just a question of weight.

The Court: Well, I don't think, Mr. Barnard, that there is sufficient foundation. We have two orchards separated by a hundred miles or more. I don't know about climatic conditions, soil conditions, water conditions.

Mr. Barnard: If the Court please, that is probably true, [354] and I intend to develop that through other witnesses. Mr. Odgen is a farmer; he has been able to get in his fields for the first time in weeks, and I wanted to use him when it was convenient.

The Court: I don't think I will permit the examination of this witness until a foundation has been established. You may remove him from the witness now, if you care to recall him.

Mr. Barnard: Very well, then, Mr. Odgen, would you step down, and I am afraid you will have to remain so that I can recall you later.

(Witness temporarily excused.)

Mr. Barnard: Mr. Fisher.

HAROLD C. FISHER

called as a witness for defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Harold C. Fisher.

Direct Examination

Q. (By Mr. Barnard): Will you state your full name, Mr. Fisher?

A. Harold C. Fisher.

Q. And what is your address?

A. 1821 Burton Way, Bakersfield, California.

Q. And what is your business or occupation?

A. I am branch manager for California [355] Spray-Chemical Corporation at our Bakersfield office.

Q. How long have you been so employed?

A. Since October of 1956.

Q. Prior to that time were you employed by Cal-Spray? A. Yes, I was.

Q. In what capacity?

A. As sales representative.

Q. In the Bakersfield area, or some other place?

A. No, in the Fresno area.

Q. How long all told have you been employed by Cal-Spray? A. Since June of 1951.

Q. Mr. Fisher, do you know Mr. Charles Grimm? A. Yes, I do.

Q. How long have you known him?

A. Since, I believe, in the late fall of 1956, that I first met Mr. Grimm.

(Testimony of Harold C. Fisher.)

Q. At that time was Mr. Hanna one of the field representatives working under you?

A. Yes, he was.

Q. And did you meet Mr. Grimm through Mr. Hanna? A. Yes, I did.

Q. Have you had occasion, Mr. Fisher, to visit Mr. Grimm's peach orchard? A. Yes, I have.

Q. And I refer to the Merrill Gem peach orchard. [356]

A. Yes.

Q. Do you recall the first time you visited that orchard?

A. The first time I saw the orchard was in the fall of 1956. However, I didn't at that time go into the orchard.

Q. Do you recall the first time you actually went into the orchard?

A. The first time I actually went into the orchard for any kind of examination was during either late March or early April of 1957.

Q. And that was after the spray had been applied that has been testified to here? A. Yes.

Q. Prior to that time, Mr. Fisher, had you had anything to do with recommending what formula of spray should be applied to Mr. Grimm's orchard?

A. Yes, I had.

Q. And was that through Mr. Hanna?

A. Yes.

Q. In other words, you didn't personally talk to Mr. Grimm? A. No, I did not.

(Testimony of Harold C. Fisher.)

Q. Did you have more than one conversation with Mr. Hanna concerning the formula?

A. I wouldn't be positive that I have more than one conversation concerning this formula. I believe however that [357] I did.

Q. And ultimately was the formula which was applied the recommendation which you passed on to Mr. Hanna, to be in turn passed on to Mr. Grimm?

A. That is correct.

Q. Was that formula a standard formula recommended by the company?

A. It is a formula recommended by the company.

Q. Now, referring then to your visit in the latter part of March or early April to the Grimm orchard, what prompted you to go out there at that time?

A. I had a call from Mr. Hanna to the effect that there was something wrong with Mr. Grimm's orchard and he would like to have my advice on it.

Q. And did you go out there with Mr. Hanna?

A. Yes, I did, that same day.

Q. Was Mr. Grimm there?

A. I believe he was. However, I am not positive whether Mr. Grimm was with us, or his foreman.

Q. At any rate, did you make an examination of the orchard? A. Yes, I did.

Q. And what condition did you find?

A. I found the trees, or a lot of the trees to be receding. By receding, I mean the leaves, you might say, were [358] turning color and marginal burn-

(Testimony of Harold C. Fisher.)

ing, the bark on the lower half of the tree was quite discolored, and with a slight sour odor.

Q. Is that all you found?

A. That is right, yes.

Q. Did you later visit Mr. Grimm's orchard again?

A. Yes, I visited it again the following day.

Q. Did you notice any different condition at that time?

A. No, I would say no different at that time.

Q. What did you do, Mr. Fisher, after having observed this condition?

A. When I had observed this condition the first day I cut a few twig samples and took them with me to Bakersfield, and in the meantime I had called Dr. Sessions, whom I met in Bakersfield that evening.

Q. And then did you and Dr. Sessions visit the orchard?

A. Yes, my second visit to the orchard was with Dr. Sessions.

Q. Was Mr. Grimm there at that time?

A. Yes, Mr. Grimm was there at that time.

Q. Let me ask you, I believe this is repetitious, you stated you found no substantial different condition the second day than the first?

A. That is correct.

Q. Did you visit Mr. Grimm's orchard at any later date? [359]

A. Yes, I did. I believe it to be in the latter part of April.

(Testimony of Harold C. Fisher.)

Q. And who was present at that time?

A. Dr. Sessions, three—let's see, I believe Mr. Rizzi, from the pomology department of the University, Mr. Hensley, I believe his name is, from the University, and a Mr. Harris from the University, and I believe a Mr. Fred Hench from the Farm Adviser's office in Kern County.

Q. What was done on that occasion?

A. We discussed it with these people, and again looked in the orchard ourselves.

Q. Was the condition of the orchard any different than the condition you had noticed the first time?

A. I would say it appeared to be more advanced.

Q. By that, you mean the unusual condition appeared to be more advanced?

A. What I think I mean—or what I mean by this statement is that the trees with no apparent condition, there was no condition—the trees which did not have the condition were further advanced in their growth, and so the sick condition appeared to be worse.

Q. Did you visit Mr. Grimm's orchard at any time later than after the latter part of April?

A. Yes, I did, about mid May.

Q. And who was present at that time? [360]

A. I was there alone with Mr. Grimm.

Q. Did you have a conversation with him then?

A. Yes, I did.

Q. Will you tell us as closely as you can what he said to you and what you said to him?

(Testimony of Harold C. Fisher.)

A. Well, I went with the express purpose of trying to get to the bottom of this whole problem, and I asked him for permission to dig one or two trees, dig them up by the roots. He refused by stating that the first time—the next time, or when the trees were dug on the place he would take them out with a bulldozer. Then I asked him if he would do me the favor of coming to Fresno with me and viewing some orchards that had similar condition, which he refused. And he told me at that time that the next time the Cal-Spray representative came on the place he would like to see them with a checkbook in their hand.

Q. Did you at that time, Mr. Fisher, or at any other time tell Mr. Grimm that you thought the cause of the condition was an oil injury?

A. I did not.

Q. And did you at that time, or any other time, tell him that a man from Richmond who carried a checkbook would be down to settle?

A. I did not.

Q. After that conversation in May, did you have any [361] further conversation with Mr. Grimm?

A. No, I didn't.

Q. Have you been on his place since?

A. I have been on the place one time since, I believe in June.

Q. Of 1957? A. Yes.

Q. Was the condition in June any different than you had noticed previously?

(Testimony of Harold C. Fisher.)

A. No different except there was some re-growth.

Q. Have you yourself conducted any laboratory tests or experiments since April of 1957 in an attempt to discover the cause of this condition?

A. I conducted no laboratory tests myself. However, I did ask deep soil samples be taken.

Q. And that was done, was it?

A. Yes, it was done.

Q. Were the results of the soil tests satisfactory?

A. It appeared to be. However, there were certain things that probably aren't the best for growing conditions, but we didn't feel them to be real detrimental so far as peach growing is concerned, or at least it wouldn't cause such a fast decline.

Mr. Barnard: You may cross examine. [362]

Cross Examination

Q. (By Mr. Hamilton): Mr. Fisher, if I recall your statement correctly, the first time that you went on the Grimm ranch after March 5th and 6th of 1957, you noted a condition of the trees which you termed receding. Was that a condition of the Merrill Gem peach trees?

A. That was the condition of the Merrill Gems.

Q. Now, what did you mean by the use of the term receding?

A. What I meant was the trees had started to bud out, the leaves were forming, the blossoms had come out, and were starting to die back.

(Testimony of Harold C. Fisher.)

Q. Then immediately after that use of the term receding, you stated the leaves were turning color. What color?

A. They were turning color with a burning on the edge, turning to a yellowish color on the edges.

Q. Light green or yellowish color, would that fairly describe it? A. Yes.

Q. This burning effect on the edge, was that a slight margin on the edge?

A. It was a marginal burn.

Q. Would that burned edge, say, be the width of a pencil line, or would it be wider than that? [363]

A. It would vary with different leaves; it might be that width, or up to possibly one-eighth inch.

Q. You, sir, did your advanced schooling at Fresno State, did you not?

A. That is correct.

Q. And you have a degree in horticulture from Fresno State? A. That is correct.

Q. As a student did you do any work in soil analysis? A. I had only one course with soils.

Q. Since your graduation from college, have you made any study of soil analysis?

A. Only in the fact that I have studied soil courses in night school since my college days.

Q. And that was sufficient for you to read the soil analysis with some degree of knowledge of the import of its content?

A. I have a chart that explains the analysis.

Q. And you did obtain a report of the soil analysis of the Grimm ranch?

(Testimony of Harold C. Fisher.)

A. I did obtain a report of the soil analysis.

Q. And the comparison of that report and your chart indicated to you that while these conditions might not be perfect, they were reasonably good; is that a fair statement?

A. I would say they were reasonably good enough that [364] we wouldn't have had this very fast recession, yes.

Q. According to your opinion, after the study of that soil analysis, there was no relation between the condition of the orchard and the result of the soil analysis?

A. I don't believe so. However, there was one thing in this soil analysis that did bother me, the fact that at about seven and a half feet there was what I would say was a false water strata. If the roots had got into this strata we would have a definite souring of the trees.

Q. Tim Hanna worked under you, did he not?

A. Yes, he did.

Q. He was under your direct supervision and control? A. That is correct.

Q. Did Mr. Hanna make any recommendations to you concerning the disposition of Mr. Grimm's claim? A. No, he did not directly to me.

Q. Did he by written communication, and by that I mean interoffice communication, make any recommendations to you concerning the disposition of Mr. Grimm's claim?

A. No. I might ask, sir, what do you mean by disposition?

(Testimony of Harold C. Fisher.)

Q. Whether the company should settle.

Mr. Barnard: If the Court please, I will object to that as incompetent, irrelevant and immaterial.

Mr. Hamilton: This is the manager.

The Court: I think I am going to overrule the objection. [365] The questions were concerning the disposition of the claims. I will overrule the objection to that question.

The Witness: May I have the question again?

The Court: Read the question, Miss Schulke.

(Question read.)

A. Monetarily, you mean?

Q. (By Mr. Hamilton): Yes.

A. No, he did not.

Mr. Hamilton: I have no further questions.

Mr. Barnard: No questions.

The Court: That is all, Mr. Fisher. Next witness?

(Witness excused.)

Mr. Barnard: Mr. Howard.

FRED K. HOWARD

called as a witness by defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Fred K. Howard.

Direct Examination

Q. (By Mr. Barnard): Your name is Fred K. Howard?

A. That is right.

Q. And where do you live, Mr. Howard?

(Testimony of Fred K. Howard.)

A. 213 North Oxford Street, Lindsay. [366]

Q. What is your business or occupation?

A. I am a retired agriculturist, doing some consultant work.

Q. And by consulting work, what do you mean?

A. Investigating all types of conditions in orchards and field crops, to determine what the causes are, if there are adverse conditions present. I have done some ranch supervision consulting.

Q. And is your work in the San Joaquin Valley?

A. Yes.

Q. And has it——

A. Part of it. I have been called for consultation in other parts of the State.

Q. Mr. Howard, can you give us a resume of your experience as an agriculturalist in the agricultural field?

A. I think I can, yes.

Q. Would you?

A. I was born and raised on a farm to start with, in 1913 so far as California is concerned and from 1913 to 1915 I was county agricultural inspector in this county, Fresno County. In 1915 and through 1918 I was county agricultural commissioner in Kings County. In 1919 I returned to Fresno, as grower service manager for the Sun-Maid Raisin Growers. In that capacity I was in charge of research and advisory work for the 14,000 members of that [367] cooperative organization. At that time I had supervision of a joint house organ publication between the Sun-Maid Raisin Growers and the California Peach and Fig Growers

(Testimony of Fred K. Howard.)

Cooperative, and as such I acted as adviser to those members of that cooperative who required it. In 1923 I went to the western office of the American Cyanamid Company, which is a large producer of, among other things, agricultural chemicals, insecticides, fungicides, weed killers, defoliates and fertilizer. I remained with the American Cyanamid Company until 1928, when I resigned and bought an interest in a small oil spray manufacturing or fabricating concern, Peerless Spray Chemical Company, at Covina, California. I remained there through '28 and '29, and then was requested to return to the American Cyanamid Company in charge of their entire agricultural chemicals work in the eleven western states. That was a larger opportunity so I sold out my interest and returned, and remained with the American Cyanamid Company in essentially that capacity until 1945, when they relieved me of the general administrative duties of that department and assigned me to work of Western Agriculturist, which consisted of working with research workers in the eleven western states in an effort to extend and promote the use of the chemicals which were then ready for sale, and to do research work on chemicals which were not yet in the sales category. [368]

I continued with that job until 1949, when I reached retirement age for the company, and I retired, moved to Lindsay, and for a short time I associated with my elder son who is a chemical engineer with a laboratory in Lindsay, and between

(Testimony of Fred K. Howard.)

us we did research work for other companies, that is companies not our own, in the establishment of methods of use, dosages, and so forth, of their agricultural chemicals. That continued until late 1951, and as sometimes happens, my son wanted to go in a different direction than I wanted to go, so we dissolved the partnership and since that time I have been in the position I stated first.

Q. Thank you, Mr. Howard. During this experience that you have just related, have you come in contact with, studied and done experiment and research with agricultural sprays containing oil?

A. Oh, yes.

Q. And have you studied and become familiar with various bacterial diseases, particularly of stone fruit trees?

A. Yes, I have.

Q. And virus diseases the same?

A. To some extent, virus diseases, yes.

Q. And how about fungus?

A. Yes, definitely.

Q. And have you become acquainted with the various soil and climatic conditions of various parts of the San [369] Joaquin Valley?

A. Yes, I have traveled extensively up and down, been in a wide variety of conditions in the Valley.

Q. I am referring primarily in that last question, Mr. Howard, to their effect, that is the effect of the various soil conditions and various climatic conditions on stone fruits?

A. Yes.

Q. And in particular peaches?

A. Yes.

(Testimony of Fred K. Howard.)

Q. Now tell me, Mr. Howard, insofar as the various bacterial diseases are concerned, is there any substantial difference between those diseases and their effect on peach trees in one part of the San Joaquin Valley and in another?

A. No, they are caused by the same bacterial organism, and it is like diseases in human beings. If you have the measles the germ that causes it is the same regardless.

Q. And is that true also of virus and fungus?

A. Yes, with the exception of the fact fungus diseases are more prevalent where there is more moisture, climatic conditions are a little more favorable to the development.

Q. All right. Now, Mr. Howard, I understand that in the spring of 1957 you did not see the Grimm Merrill Gem peach orchard?

A. To my knowledge I have never been in the Grimm [370] orchard at any time.

Q. At least you did not study it? A. No.

Q. For the purpose of determining any—

A. No.

Q. —causes or effects? A. No.

Q. Then, Mr. Howard, let me ask the following hypothetical question: assuming that in the year 1957 you had a peach orchard of 20 acres in the Mettler Station area of Kern County, California, consisting of approximately six acres of six year old Gold Dust peach trees, approximately six acres of six year old Blazing Gold peach trees, and approximately eight acres of four year old Merrill

(Testimony of Fred K. Howard.)

Gem peach trees; and assuming further that all of such peach trees had been grown from S-37 root stock; and that in January or February of 1957 a carry-over of spider mites from the previous year was observed, and a little bit of Parlatoria scale had appeared; assuming further that around the 26th of February the entire orchard had been irrigated, and on March 5th its condition was as follows: the Blazing Gold trees were in pink bud stage with approximately 60 per cent of the buds showing color, and the same percentage of the leaves showing green tips; the Gold Dust trees were also in pink bud stage with approximately 30 to 40 per cent of the [371] buds showing color and the same percentage of the leaves showing green tips; that the Merrill Gem trees were in swollen bud stage with approximately five per cent showing color and the same percentage of the leaves showing green tips; assuming all of the above to be true and to be the condition on March 5th, would it, in your opinion, be safe and good farmerlike practice to spray those trees with the following spray: four per cent Ortho-K flowable medium oil, two pounds of Ortho basic lead arsenate, and two pounds of Mitox wettable to each one hundred gallons of water, and to apply that spray at the rate of 400 gallons per acre?

A. I would consider it safe, yes.

Q. Can you explain to the jury what factors of what things would cause you to have that opinion?

A. I have never seen any damage to a deciduous

(Testimony of Fred K. Howard.)

tree in that stage of growth resulting from the application of a foliage type oil, which Ortho-K happens to be, at any concentration. So far as the other materials are concerned, both of them are, I believe, fairly safe when used with oil or without oil. I would have only one slight reservation, and it is not a question of injury, and that is I do not recall your mentioning any pest present which would be—would require the use of basic lead arsenate. However, I assume that was used or recommended because of the possibility of the presence of peach twig bore, for which it is used [372] commonly.

Q. Had you completed your answer?

A. I think so.

Q. Would the basic lead arsenate do any damage even if the peach twig bore was not there?

A. Oh, no; no, it would be just simply something put in there just in case it happened. It is not an expensive proposition.

Q. Mr. Howard, now assume all of the facts which we have just covered in the first question I asked you, and assume that on March 5th and 6th of 1957 the solution mentioned was applied to the orchard at the rate of 260 gallons per acre; assume that approximately a week thereafter a burning of the petals in the blossoms on the Gold Dust and Blazing Gold trees was noticed, and that approximately a week after that, or two weeks after the spraying, it was noticed that the leaves on one of the Merrill Gem trees didn't develop properly and turned yellow, and that the tree had a very un-

(Testimony of Fred K. Howard.)

healthy look; assume that this condition continued on this tree for several days and that thereafter a similar condition appeared on many of the other trees in the orchard, and that thereafter the condition of each tree grew worse day by day; that on some of the limbs which were not badly affected fruit would develop and then suddenly remain in a static condition and [372] cease growing—

A. Will you repeat that last sentence, I didn't get it all.

Q. That on some of the limbs which were not badly affected fruit would develop, or did develop and then suddenly remained in a static condition and ceased growing, so that you had all sizes of fruit and all conditions of fruit from peanut size up to walnut size or larger—or I believe Mr. Grimm said a golf ball size—and assume further that at the time the condition was first noticed, the trees had not yet advanced to the stage where a substantial amount of fruit was out, but that as time went on the trees put on leaves and did bear fruit, but that much of the fruit did not mature, and that the leaves curled and dried; assume also that there was a sour smell around any of the limbs where the bark had been damaged and the cambium layer was exposed and that the cambium layer was darker than usual; assume that this condition of sour smell, discoloration existed throughout the entire orchard wherever the condition of damage existed; and assume that later in June, or at least late in the summer, the trees began to improve, and some of them

(Testimony of Fred K. Howard.)

put out new shoots and new limbs, to where in September some of the trees were such that from casual observation you could hardly tell they had been affected; assume all of these [373] conditions to be true; and also that the adjoining Blazing Gold peach trees and the Gold Dust peach trees were entirely normal and unaffected and produced normal crops; assume all of those, in your opinion could those conditions have been caused by the application of the spray formula previously described on March 5th and 6th? A. No.

Q. Will you tell us why?

A. Yes. I stated previously that in my opinion the spray formula was entirely safe under all conditions existing at that time. I see and can conceive of no way in which sufficient oil, regardless of what was in it, that is the other materials that were combined in the formula, that could penetrate the protective bark to the extent that it could cause that kind of damage.

Q. If oil was applied in a sufficient quantity to cause damage, what parts of the tree would be damaged?

A. The younger wood; the leaves, of course, would be affected first, assuming that the oil was an oil that could damage the leaves. The leaves first, and then the young wood, young twigs would be the damaged portion, not the older wood.

Q. And why not?

A. Because they are less protected; the older wood has a very, very substantial wrapping around

(Testimony of Fred K. Howard.)

the growing layer, [374] the bark is certainly very protective, so protective, in fact, that in the early days back in 1916, '17, '18, a common formula used on dormant deciduous trees was crude oil around ten per cent with whale oil soap to permit it to mix with water, and about two pounds of ordinary household lye, and that was sprayed on, and it was a normal, usual practice for several years.

Q. Is the wood of a peach tree any more susceptible to damage after the blossoming has begun than it is in the dormant stage?

A. It normally would be less susceptible during that period than, after the sap was coming up from below.

Q. Do I take it then, in other words, the presence of the sap in the branches would be a protection in itself?

A. Right, for this simple reason, that as we all know oil and water don't mix, and if you put oil and water together the oil always comes to the top immediately, and if that tissue, that cambium layer, the growing layer, is full of water it would act as a normal natural repellent to that oil, and would not permit it to get into the cambium layer.

Q. Mr. Howard, assuming that oil is sprayed on a tree in sufficient quantities to cause damage, when would the damage appear?

A. Well, quite rapidly.

Q. Would it be normal to expect the damage to appear [375] a week to ten days later?

A. Oh, I don't know. I have seen so little oil

(Testimony of Fred K. Howard.)

damage. I don't know that I could answer that question, but it is a contact effect, that is, it destroys the tissue and if there is anything in the oil that will do any burning it destroys the tissue when it hits and that is a very quick action. I don't know whether your question is directed towards its effect on a leaf, or with respect to its effect on a twig, which might happen if it was a herbacidal oil, one which is designed to kill such tissue.

Q. Mr. Howard, in a four-year old peach tree with approximately five major or scaffold limbs, is there any reason why some limbs would be more susceptible to oil damage than others?

A. No, none at all.

Q. Is it your opinion, in other words, that if such oil was applied to damage one limb it should damage all limbs?

A. Yes. I am assuming in that statement that the oil was put on uniformly in a workmanlike manner.

Q. Yes. Now, Mr. Howard, you have heard me read two questions which assumed certain facts, which stated certain conditions of Mr. Grimm's orchard last spring. Have you seen conditions similar to that, or similar to those conditions described in the Grimm orchard, in different locations in the San Joaquin Valley? [376]

A. I worked with a condition essentially the same, scaffold branches dying soon after spring growth started, first, I believe in 1916, in apricots in Kings County. I have seen similar conditions

(Testimony of Fred K. Howard.)

since that time at more or less infrequent intervals.

Mr. Barnard: I believe you may cross examine.

The Court: I think, gentlemen, we will take our morning recess.

Members of the jury, bear in mind the admonition I have given you. We will take a short recess.

(Short recess.)

The Court: The jury is present, gentlemen?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: All right, Mr. Hamilton.

Cross Examination

Q. (By Mr. Hamilton): Mr. Howard, your principal field of research and work with agricultural commodities has been in the field of cotton, has it not? A. No, oh, no.

Q. It has not? A. No.

Q. Mr. Howard, you have testified in many legal proceedings, have you not? [377]

A. I have testified what?

Q. In many legal proceedings?

A. I have testified in some, I wouldn't say many.

Q. In the past year, let's put it in the calendar year 1957, in how many cases did you appear as a witness? A. I think one.

Q. And the year prior to that, sir?

A. Possibly two. I don't keep a calendar of those things.

Q. When was the date on which you retired?

A. I am trying to go back, I can't add very fast,

(Testimony of Fred K. Howard.)

or subtract very fast. I retired just about ten years ago, a little less than ten years ago, from the Cyanamid Company.

Q. And since that time you have been an agricultural consultant?

A. Except for the time that—well, I guess I was too, at the time I was in partnership with my older son, who is a chemical engineer, I have been doing that, and of course the work there was in that same field.

Q. Do you recall approximately, sir, how many actions you have testified in as a witness since your retirement?

The Court: I assume, Mr. Hamilton, you are referring to testimony as an expert?

Mr. Hamilton: Yes.

A. I presume the total is somewhere around seven, maybe seven total. I might add that two of them were as witness [378] for your partner, Mr. Conron.

Q. And how many of those cases involved cotton or potatoes?

A. Both of those involved cotton and potatoes.

Q. And of the total number of cases in which you have appeared as a witness?

A. About half of them have been cotton.

Q. Has that been as a witness for the defendant in all cases?

A. In all cases that has been for the defense.

Q. Now, you did not see the Grimm orchard?

A. No.

(Testimony of Fred K. Howard.)

Q. So far as you can recall, you have never been in the Grimm orchard?

A. That is right.

Q. You don't know in the spring of 1957, and referring to March, April or May whether there was any sour smell present in the orchard or not?

A. No, I can't smell that distance.

Q. You have no knowledge of the color of the leaves? A. No.

Q. The appearance of the orchard in any way, shape or form?

A. Not from visual observation, no, sir.

Q. What particularly, sir, what and where and under [379] what circumstances have you investigated oil spray injury to peaches?

A. The American Cyanamid Company, with whom I spent a good many years is—was one of the two producers in the United States of a material to fumigate citrus trees. Until some of the more refined oils were used, that was an exclusive fumigation field, pest control field for the control of scale. With the advent of these foliage sprays the oil spray business became very seriously competitive, and I wish to assure you that the question of oil and oil injury to trees in foliage of any kind was quite a serious commercial matter to me and to my staff, and I honestly tried or I tried honestly to find places where these foliage oils caused damage, because it would be a very good competitive method of keeping our sales going. I might add that in the intervening years, oil spray has continued to be a

(Testimony of Fred K. Howard.)

major material for use on tree foliage, and neither the American Cyanamid Company nor DuPont Corporation, who were the other manufacturers, are now producing and selling this gas for that purpose. In other words, competitively the oil business has taken the foliage deal.

Q. But, sir, I asked you for specific instances of experimentation or investigation of oil spray injury to peaches.

A. I can't remember specific instances, no, sir.

Q. There is a disease in peaches called bacterial canker, is there not?

A. There is a disease called bacterial canker which is prevalent on stone fruits of all kinds, including peaches.

Q. And that disease is also known as bacterial gummosis? A. Yes.

Q. The two terms refer to the same disease?

A. Yes, I think that possibly in the years gone by there have been some other designation of the disease.

Q. Now, is that an infectious disease?

A. Yes. Definitely.

Q. It is a pathogenic disease? A. Yes.

Q. Caused by a bacteria?

A. Caused by bacteria, let us say, not a bacteria. I am not positive that anyone knows specifically a bacteria which causes the disease.

Q. Can the bacteria which causes bacterial canker be isolated and cultured?

A. I believe it can, that is the group can. As I

(Testimony of Fred K. Howard.)

repeated, I am not sure that anyone has yet succeeded in saying this is the one.

Q. Then you would not quarrel with Mr. Weigle, who made the cultures, and his statement that if bacterial canker were present he could have cultured it? [381]

A. I wouldn't quarrel with him, but I would disagree with him. I believe that his statement was that he did not find it, which is different than not being present.

Q. But he also stated he attempted to culture it?

A. Yes. May I add something here?

Q. You may, sir.

A. In 1916 in Kings County when I was commissioner, we had an outbreak of a condition in apricots, south and east of Armona, which was puzzling to me as commissioner. I asked for help. I got that help from Dr. J. T. Barrett, plant pathologist of the Citrus Experimental Station at Riverside. Dr. Barrett came to Hanford, and we spent several days, and at two or three different intervals, during that spring—I think it was the spring of 1916—and Dr. Barrett at that time was not familiar with the disease. He did not know what caused it. In the process of our investigation, surgical work, and so forth, we took small samples of the bark, small wedges of the bark from the diseased area on the trees and cut openings in apparently healthy trees and inserted those wedges to see if we could infect the healthy tree. Now, in spite of our care in select-

(Testimony of Fred K. Howard.)

ing what we thought were areas of active disease, we were not able to get 100 per cent infection as a result of that. We did get some, and that established, as far as I know, the first known outbreak of a bacterial disease of that type in the State [382] of California. Later it was learned that a similar disease had occurred in Oregon, and I have had the pleasure of talking with Dr. Barss who did the work there about his experience with it. The disease within the following year was not particularly prevalent in this orchard, and it was—there were a few limbs lost in other orchards in the area and for quite a period following that outbreak we had no more serious trouble with it. In other words, it has been called commonly a hit and run disease.

Q. This is bacterial canker you are talking about?

A. That is bacterial canker I am talking about.

Q. Mr. Howard, what is the principal vector of bacterial canker?

A. That I don't know. I do know some of the vectors. I know at least one of the vectors, that is insect carriers through blossoms. I know that, that is I believe it. It is pretty hard to say I know. I believe it because we found in many cases in this particular orchard fruit sperm on which had been bloomed with a small canker at the base of the sperm on older wood, and naturally and I think quite logically Dr. Barrett and myself assumed that it had been carried by insects visiting from blossom to blossom.

(Testimony of Fred K. Howard.)

Q. Now, you understood me, by my use of the term vector the carrier which spread the disease?

A. Yes, yes. [383]

Q. Carries it up and down the tree.

A. I would say the vector was an insect.

Q. Is it not, sir, true that the principal vector is rain and wind?

A. That is entirely possible, but I personally have no proof of that. We thought when we were working on this that the infection occurred in the late fall and during the winter, and that the disease progressed during the dormant months, otherwise it could not with new infection in the spring have spread so rapidly over the main scaffold branches.

Q. You are familiar, are you not, with Dr. E. E. Wilson's work on bacterial canker, as that appears in the Year Book of 1953? A. I have read it.

Q. And you have no quarrel with his indication that rain is a factor?

A. No, I wouldn't question it.

Q. Now, in Kern County in 1957, what was the rainfall, do you recall? A. No, I don't.

Q. Do you know whether it was a dry year or a wet year?

A. I have no recollection. Of only one thing I am sure, it was not as wet as this year has been.

Q. Do you have any recollection as to whether or not there was any rain in March? [384]

A. No. No, I don't.

Q. Mr. Howard, are there any varietal differ-

(Testimony of Fred K. Howard.)

ences in susceptibility among various varieties of the same kind of stone fruit to oil injury?

A. To what?

Q. Oil injury.

A. You will have—will you please define what you mean by oil injury? Are you talking now about foliage oil, or so-called dormant oil.

Q. Let's take the whole field, dormant and foliage, are certain varieties of peaches, for instance, more or less susceptible to oil injury?

A. I have no knowledge of any difference, any material differences that is true year after year.

Q. Is that same thing true as to susceptibility to bacterial canker?

A. No, I think not. My—going back again to this work with which I am very familiar, two of these varieties, the Royal and the Tilton, had at that time greater incidence of the disease than did the Blenheim variety in the orchard. Now, that doesn't establish a resistance by any matter of means for Blenheims, because there were also trees of the Royal and the Tilton which were not affected, and we have to take those things into consideration.

Q. Now, sir, the bark on peach tree wood that is two [385] years old and older, are there any openings in that bark?

A. Oh, yes, sure.

Q. There are?

A. Yes.

Q. What is the nature of those openings?

A. Well, I would call them more or less of a slit, lined with a corky substance.

Q. Those are lenticular—

(Testimony of Fred K. Howard.)

A. Well, they call them lenticels, yes, if you want the technical name for them. I was trying to avoid it.

Q. And at the area of that opening there is very little protection for the cambium layer, isn't that correct? A. Against what?

Q. Against matters that might be applied to the outside, such as oil?

A. No. It is—there is no chance, in my opinion, of oil getting in through those openings as ordinarily applied. I can conceive of your putting a piece of wood and soaking it in oil and getting some oil into the cambium; but not under ordinary cultural conditions, that is spray conditions, can I conceive of oil going into the lenticels and cambium.

Q. Then you would quarrel with Dr. Hesse's statement? A. Oh, absolutely; absolutely.

Q. Now, sir, the use of dormant oil, oil designed, manufactured for the purpose of agriculturists using them [386] for dormant spray—

A. Yes.

Q. —the use of oils of that kind and sulfur compounds in the same spray are wholly compatible, are they not? A. Yes.

Q. There is very little chance of injury from a combination of sulfur and the dormant spray oil?

A. Following the use of crude oil there was a period of years before the foliage oils were developed in which it was a common formula to use a dormant type spray oil with liquid lime sulfur.

(Testimony of Fred K. Howard.)

Thousands of gallons were used not only on deciduous but on citrus in the foliage.

Q. Now, the foliage spray oils are a more highly refined oil, are they not?

A. That is right. That is right.

Q. And foliage spray oils and the sulfur based compounds, such as lime sulfur, are wholly incompatible, are they not?

A. They are compatible, they will mix; but I would certainly advise against using those two you speak of in a foliage oil, on foliage.

Q. In the compatible chart they are listed as being non-compatible?

A. Well, you have to stretch the meaning of incompatibility. It is a question of whether you can put them together, or whether they are safe to use.

Q. My question, of course, in reference to compatibility is whether they are safe to use together?

A. I wouldn't want to use elemental sulfur on foliage with oil at any time.

Q. Such a combination is then dangerous?

A. Elemental sulfur, yes.

Mr. Hamilton: I have no further questions.

Redirect Examination

Q. (By Mr. Barnard): Mr. Howard, I have a couple of questions. Are you familiar with the formula of a product known as Mitox?

A. I have read it. I am not an organic chemist so I can't discuss it.

Q. Are you familiar with the ingredients?

(Testimony of Fred K. Howard.)

A. Yes, it is a hydrocarbon and I believe it is a sulfite form.

Q. Is there in Mitox what is called, I believe, I am not sure, unsulfinated residue?

A. In Mitox?

Q. I am over my head, Mr. Howard.

A. You are certainly over mine.

Q. Let me ask the question this way: You just testified that you would not use sulfur,—

A. Yes.

Q. —and foliage oil together on foliage? [388]

A. Yes.

Q. Are you thinking of the same type of sulfur as is found in Mitox? A. Oh, no; no.

Q. Is there anything in the Mitox in the way of sulfur which would hesitate to use with foliage oil?

A. No. Oh, no. No, there are many materials that contain some sulfur used regularly with oil, as many or more with comparable sulfur, so-called, as Mitox contains, as far as my information is concerned.

Mr. Barnard: No further questions.

Mr. Hamilton: I have no further questions.

The Court: Do you need Mr. Howard any further?

Mr. Hamilton: He may be excused.

The Court: As far as the Court is concerned, you are excused. Next witness?

(Witness excused.)

Mr. Barnard: Mr. Ogden.

GEORGE W. OGDEN

recalled as a witness for defendant, having been previously duly sworn, was examined and testified as follows:

Direct Examination

Mr. Barnard: If the Court please, I have asked the reporter if she could read to me the last couple of questions before Mr. Hamilton's objection to Mr. Ogden's testimony [389] so that I can remember where we were.

The Court: Very well.

(Record read.)

Q. (By Mr. Barnard): Did you hear the last question read? And the answer? A. Yes.

Q. Did the condition in your orchard which you have described continue throughout the growing year?

A. Yes, on some of the trees. Some of them died immediately, and some of them lingered on until in the fall.

Q. Were some of them unaffected?

A. That is right.

Q. Now, Mr. Ogden, may I show you a photograph which has been marked as——

Mr. Hamilton: Your Honor, I am going to repeat my original objection. We have heard nothing so far that would change the picture of relevancy of what happened to Mr. Ogden's orchard and what happened to the Grimm orchard.

Mr. Barnard: If the Court please, Mr. Howard has testified that he is familiar with bacteria, virus, fungus diseases; he is familiar with soil conditions

(Testimony of George W. Ogden.)

and climatic conditions in the various parts of the San Joaquin Valley, and has stated as his opinion that there was no substantial difference in the way they affected peach trees in one part of the Valley from another. I submit that certainly makes [390] the testimony relevant, and that any difference or claim of difference is merely a matter of weight to be considered by the jury.

Mr. Hamilton: May it please the Court, I heard Mr. Howard say nothing to indicate that the conditions, climatically or soilwise or otherwise would be the same in the Grimm orchard as that of Mr. Ogden's orchard.

Mr. Barnard: I didn't say he said that. He said different conditions existing in the Valley would not essentially affect the appearances and the effect of the disease.

The Court: Well, I gathered the effect of his testimony was that a pathogenic disease to a tree would be the same in Fresno or Bakersfield or Oregon or most any place, just as he indicated that a person has measles in California, why, it would be the same measles, I suppose, somebody else might have. I think though I am going to sustain the objection to the question.

Mr. Hamilton: Thank you, your Honor.

Mr. Barnard: If the Court please, it is a quarter of 12:00, and I would like to make an offer of proof. Could we excuse the jury for the noon recess.

The Court: Have you any other witness that you

(Testimony of George W. Ogden.)

can put on, and you can make the offer of proof later.

Mr. Barnard: I have one more witness, but his examination [391] will be quite long, and I would rather not get barely started and then stop. He will be the last witness, your Honor.

The Court: Well, members of the jury, the Court will excuse you now for luncheon.

(Admonition to jury, and jury retires from the court room at 11:45 a.m., and the following proceedings were had outside the presence of the jury:)

The Court: Let the record show that the members of the jury have departed from the court room.

Now, Mr. Barnard, in connection with this proposed testimony, Mr. Ogden has his peach orchard in Fresno County, which is located some 150 miles away from, I assume about 150, Mettler Station.

Mr. Hamilton: It would be close.

The Court: There is no testimony in the record asserting similarity of soils between the two places. There is no testimony concerning similarity of wind, of water, rainfall, climatic conditions. There is no testimony concerning similarity between temperatures between the two areas at the same seasons of the year. Mr. Ogden has no Gem peaches.

I don't think that Mr. Howard testified that in his opinion bacterial canker caused the condition of the trees on Mr. Grimm's orchard.

Mr. Barnard: Well, it was not my purpose to

(Testimony of George W. Ogden.)

prove [392] bacterial canker caused the condition of Mr. Ogden's orchard either.

The Court: Well,—

Mr. Barnard: The purpose of the line of questioning, if the Court please, was to show that a very similar condition existed on an orchard which had not been sprayed with an oil spray in the spring of 1957 nor in the winter of 1956. We have photographs of the orchard. Mr. Ogden has partially described it, and could continue. I believe that it is certainly a matter of weight for the jury.

The Court: Well, you are going on the assumption, I assume, that here is a certain condition in Mr. Grimm's orchard, you intend to show a similar condition in Mr. Ogden's orchard. Now, are you seeking to show the same causation in each instance brought about the condition?

Mr. Barnard: If the Court please, the burden is not me to show the causation.

The Court: I realize that.

Mr. Barnard: This testimony will remove one of the factors which is different between the two orchards, and that is the application of oil.

The Court: Well, I think for the time being you can make your offer of proof, and I will give it a little further thought and study. But you make your offer of proof, what you intend to prove by Mr. Ogden. I think it is just as easy [393] to ask him the questions in connection with the offer of proof, and it will be understood that it is an offer of proof.

(Testimony of George W. Ogden.)

Mr. Barnard: Very well.

Q. Mr. Ogden, I will show you a photograph marked Defendant's Exhibit D for identification, and ask you if you recognize that?

A. Yes.

Q. And what is it?

A. Gold Dust peach tree and my son is out there. For sure identification it was taken with my son standing by the tree.

The Court: That is one of your Gold Dust trees in your orchard at Clovis?

The Witness: Yes.

The Court: When was the picture taken? Approximately?

The Witness: I imagine you will have to tell.

Mr. Barnard: The date is on here. It was in 1957. Was it in the spring of 1957?

A. Yes, spring, probably May.

Q. I show you next a photograph marked Defendant's Exhibit E for identification, and ask you if you can identify that?

A. Yes, it is another Gold Dust tree, and my tray shed in the background. [394]

Q. Was this picture also taken in the spring of 1957?

A. I believe it was taken the same day.

Q. The same day. I will show you another photograph, Mr. Ogden, Defendant's Exhibit F for identification, and ask you if you can identify that?

A. Yes, it is another Gold Dust tree, about the center of the orchard.

(Testimony of George W. Ogden.)

Q. Taken?

A. The same time. The other trees were not affected.

The Court: Are those trees in the background there of the same variety?

The Witness: Yes.

Q. (By Mr. Barnard): The trees in the background you just stated were not affected?

A. That is right.

Q. I will show you the last photograph, Mr. Ogden, marked Defendant's Exhibit G for identification, and ask if you recognize that photograph?

A. Yes, it is near where the other one was taken because the tray shed is shown in the background. You see this tree is almost dead while the others are in complete foliage.

Mr. Hamilton: May I have what variety?

The Witness: Gold Dust.

The Court: All Gold Dust, is that right? [395]

The Witness: That is right.

The Court: That is what number?

Mr. Barnard: G for identification.

Q. Mr. Ogden, the small black spots that appear on the limbs where foliage has dropped, are those peaches?

A. Small peaches, withered, still hanging on the tree.

Q. Now, Mr. Ogden, did you spray your orchard, your peach orchard, and the one in which these pictures were taken, with any oil spray of any kind in 1957, in the spring, or in the winter of 1956?

(Testimony of George W. Ogden.)

A. No, I did not.

Q. Have you ever been able to determine the cause of the condition of your trees?

A. No, I have not. It is just my assumption what caused the death.

Mr. Barnard: I believe, if the Court please, that covers the matter insofar as my offer is concerned. If the evidence is to be admitted there might be another question or two, but I think it certainly is sufficient to establish a record of the type of testimony we offer.

Mr. Hamilton: If the Court please we maintain our position on the lack of materiality and relevancy.

The Court: Do you care to ask the witness any questions?

Mr. Hamilton: The trees in the picture which you show, Mr. Ogden, did those trees die or were there limbs on them [396] that died?

A. Yes, some of them completely, and some of them partially.

Mr. Hamilton: Some of the trees depicted in the pictures died completely, and some of them parts of the tree died?

A. Yes.

Mr. Hamilton: That will be all the questions.

Mr. Barnard: Your Honor, there is one question I forgot.

Q. Mr. Ogden, do you know the root stock upon which your Gold Dust peach trees are based?

A. S-37.

(Testimony of George W. Ogden.)

The Court: I think he testified to that earlier.

Mr. Ogden, when did you irrigate in the spring of 1957, this peach orchard?

The Witness: We get our ditch water around the middle of the month, and I imagine, poor recollection, it is probably around the 12th to 15th of April.

The Court: That would be the first irrigation that season?

The Witness: Yes.

The Court: You didn't irrigate in January, February or March?

The Witness: No, sir.

The Court: All right. I will consider it a little over [397] the noon hour.

So the Court will now recess until a quarter of two, as far as this case is concerned.

(Thereupon, at 12:00 noon, a recess was taken until 1:45 o'clock p.m. of the same day.)

Afternoon Session, 2:00 p.m.

The Court: The jury is present, gentlemen?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: The Court will delay the announcement of its ruling.

Mr. Barnard: Very well. Dr. Sessions.

DR. ALWYN C. SESSIONS

called as a witness for defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: Just state your full name, please.

The Witness: Alwyn C. Sessions.

Direct Examination

Q. (By Mr. Barnard): Will you state your full name, please, Dr. Sessions?

A. Alwyn C. Sessions.

Q. And where do you live?

A. 530 North Circle Drive, Fresno, California.

Q. By whom are you employed, Dr. Sessions?

A. California Spray-Chemical Corporation.

Q. In what capacity?

A. Director of research and technical work in the San Joaquin Valley.

Q. For how long a period have you been so employed? [399]

A. Twenty-six years, not in the valley.

Q. Twenty-six years for the company?

A. Yes.

Q. How long in the Valley?

A. Twelve years.

Q. Will you tell the jury, Dr. Sessions, your educational experience, in higher education, above and beyond high school?

A. I have a B.S., Bachelor of Science from Utah Agricultural College in agronomy and soils. I have an M.S. from Amherst, Massachusetts in soils and chemistry. I have a Ph.D. from Rutgers,

(Testimony of Dr. Alwyn C. Sessions.)

New Jersey, in plant physiology, with minors in biochemistry and soil microbiology.

Q. Have you had any other special training in the field of agricultural science?

A. Scholastic?

Q. Scholastic or otherwise?

A. Well, since—when I got my degree I started working for California Spray on a national research fellowship by the Crawford Technical Institute, and since that time in '29, every year since then I have been involved in the spraying, my own spraying, my own self putting on experiments in research work pertaining to sprays, as to their control, and their effectiveness in killing bugs, and also their toxicity or safety toward higher plants. I have also been associated, was for ten years as assistant director of [400] research under Mr. William H. Volk, who is the father of white oils, summer oils, which are so frequently called Volk oils. Most of my work during this time, that is, the predominance of my work, has been with oil sprays, although I have several patents also in copper fungicides, wetting agents, and so forth.

The Court: Dr. Sessions, sometimes you let your voice drop when you finish a sentence. Will you keep it up, so we can all hear you?

Q. (By Mr. Barnard): During the recent years, the last 12 years that you have been in the San Joaquin Valley, Dr. Sessions, have you been concerned with various types of stone fruit trees?

A. Ever since I came to the Valley my primary

(Testimony of Dr. Alwyn C. Sessions.)

assignment has been stone fruit, and when I was in Watsonville, in charge of the research laboratory after Mr. Volk passed away, I came to the Valley working on stone fruits for some eight years before I actually moved here.

Q. Has your work in stone fruits included the testing of various types of sprays on the stone fruit trees?

A. There hasn't been a year since I got my degree that I haven't applied and tested various sprays on stone fruits, and there hasn't been a year there hasn't been oil included in those tests, not one single year, and since I have come [401] to the Valley of course I have put on my own tests.

Q. Has that included both dormant oil and summer foliage oil?

A. That has included both summer oils and your dormant spray oils.

Q. Has your experience with stone fruit trees included peach trees?

A. More than any other by far; some cots but most of it has been on peaches.

Q. Dr. Sessions, in the spring of 1957, did you have occasion to visit Mr. Charles Grimm's Merrill Gem peach orchard in Kern County?

A. Yes, I did.

Q. Can you tell us when you first visited that orchard?

A. The first time I visited the orchard was near the first of May, 5th and 9th of May, I think, somewhere in there.

(Testimony of Dr. Alwyn C. Sessions.)

Q. And what——

A. Wait a minute—April. I beg your pardon.

Q. 5th of April.

A. To the 5th or 9th of April, I think, the first time.

Q. What condition did you observe at that time?

A. Well, we went into the orchard with Mr. Grimm, and those who were with me, and we started investigating, perhaps the most complete investigation that was made up to that time. We first looked over the orchard and as we did we questioned [402] one another about every angle we could think of, asking questions of one another back and forth, to see if we could decide what it might be, and of course we took a shovel and dug a little over the surface of the roots to see if there was any discoloration, because some diseases start there. And then we would start at the base of the tree and work up with a knife, cutting little pieces of branches of the tree to see where it was brown area, water-soaked area, under the bark, and then we would go up higher, and then consideration was given as to what that might be. We cut several branches, we examined as we do other things, and to determine if possible what the trouble was.

Now, I could give you a description of the orchard. Is that included in your question? I don't remember the question.

Q. That is sufficient for that question. Let me ask you, was there discoloration in the trunks and larger limbs of the tree?

(Testimony of Dr. Alwyn C. Sessions.)

A. Yes. As we would start up with our knife, we went around cutting it off, in these branches that had the leaves that had come out after the spraying was done when the spring came and the leaves started coming out and the blossoms came out, the little fruit formed. Now the little fruit comes up here, drying up, the leaves they were drying up, and as we came up with our knives cutting along we would find [403] an area on some limbs that was very decidedly dark underneath the bark, the cambium.

Q. Were those areas water soaked?

A. They had a water soaked appearance, a brown water soaked appearance.

Q. Did they smell sour?

A. They smelled sour, in fact Mr. Fisher called my attention to the smell of it at that time, and all of us. It wasn't as heavy as it was the second time I visited it.

Q. Now, do you have anything else, Dr. Sessions, to tell us concerning the condition of the orchard upon your first visit?

A. Well, it was obvious that certain scaffold limbs as you move up, it looked like at that time like many of them were going to die, because the fruit, the little leaves on the top that had come out were withering, and this little fruit up here was not developing. Now up here there would be a limb, as has been testified, that would be normal, but this limb would not. Now, it was true, I felt, that most, the greater predominance of this was on the south

(Testimony of Dr. Alwyn C. Sessions.)

side of the trees. I think Mr. Grimm called attention to that and it seemed to be a pattern as you looked down the orchard from one way, you would see more than if you looked from the other way. And then I noticed too that it followed down the rows more—I can't tell whether [404] it is north or south, but the pattern seemed to follow down the rows the long way of the orchard, the way the water runs. I guess the spraying is done from the house down to the other end.

Q. Now, then, Dr. Sessions, when did you next visit the orchard?

A. I visited the orchard next perhaps two weeks later as I recall. I have those dates here, I think, because I looked over my testimony. April 5th and 9th. Yes, that is about that. I got here the 26th perhaps to the 4th of May.

Q. And what was the condition the second time?

A. The second time the condition had—appeared worse because here was the tree that had now come in leaf, one branch, before it was cut off, come in leaf and had the peaches growing on it, here was another on the same tree withered up, dried, leaves gone now, fallen, and peaches on a bare limb, and down below now as you cut you really got a dark area down on the big limbs, and then of course we had the smell, the odor, and it was obvious, we thought, that it may—I thought the orchard was going to look worse than it did later on.

Q. Did you visit the orchard at any other time in the future?

(Testimony of Dr. Alwyn C. Sessions.)

A. I drove past the orchard once, and went in just at the far end. I can't remember the date. I didn't go to [405] the house, I was with someone; I just pulled around and looked and noted there was spider coming in the fall. I was going to say something about it, but I don't think I ever did, along the later part of the summer. The crop had been picked. Then I visited it again, oh, I guess, three weeks ago, something like that.

Q. All right, Dr. Sessions, from your observation on your visit in early April, and your later visit in either late April or early May, was the condition which you noticed consistent with an oil injury? A. No, it wasn't.

Q. Can you tell us why?

A. Yes, I think I can. In the first place, I think we should distinguish here in court two types of injury from oil. There is an injury we get on the leaves and the buds, which is the first injury and the one we most often see, and that occurs as has been testified when the trees are coming out in bloom or in leaf and we spray them with a heavy dormant spray oil. Now when we spray them with a heavy dormant spray oil at that time of season you are apt to drop some of the buds, and if any of them is in leaf naturally it will burn the petals with heavy dormant spray oil. Now, because of that, and if it is more severe you get some of the little twigs burning. So when we examine, when you go in and see such a thing happen, and it does happen sometimes, [406] then we start always, start up the little

(Testimony of Dr. Alwyn C. Sessions.)

twigs to see how far down the tree the oil burned. Now, that is logical if you will think through because we are applying a chemical from the outside, it is burning from the outside in, and not coming up as disease at all from the inside plugging the tissues of the inside of the tree up, and when it is from the inside up and plugging the tissue then of course you don't kill those buds when they come out and bloom. Never in my life have I seen twigs or limbs as big as my wrists or bigger, like these are, and yet see fruit on that same limb, see buds come into leaf, see blossoms develop, see fruit form, and then have enough oil to kill the bottom. In fact, you couldn't possibly kill the bottom of these trees with a spray oil even at 25 per cent applied at the time you did, even with a dormant oil. If we could, just think, if we could have had something we could spray four gallons to a hundred, 400 gallons to an acre, four gallons of spray, and kill big trees like this, we would have the best herbicide in all the world, there is nothing equal to it.

Q. Dr. Sessions, were you able from your observations of the Grimm orchard in April and early May of 1957, to reach a conclusion as to what the cause of the condition was?

A. When I first went into the orchard, naturally it is not what I think immediately, it is what the facts are, and [407] so I went into the orchard and the time we first went in I was very reserved to say what it was, because I naturally—I wanted to take Mr. Grimm along with my thinking. So when we

(Testimony of Dr. Alwyn C. Sessions.)

came out of the orchard that time, I visited another orchard in the area to see—these diseases are the same wherever they are. We get a spray burn in Florida today on peaches, it will be the same type of thing we get here. If the disease is bacterial disease and will hit in one state it is the same here. And so I looked over the orchards in this Valley, and I had previously been associated very closely with a disease which looked very much like this. The star witness you may say that is the orchard at Atwater at the experimental station where I have carried on experiments and where I am carrying on this.

Mr. Hamilton: I am going to object to Dr. Sessions comparing other orchards with the Grimm orchard, orchards of unknown type, we don't know what kind of peach they are, we know nothing about the characteristics or similarity of the trees in the orchard.

The Court: It wasn't clear in my mind the witness was going into comparisons. I thought it was part of his investigation and examination. Read the question, Miss Schulke.

(Question read.)

Mr. Hamilton: I will make the further observation the witness' answer is not responsive to the question. [408]

The Court: I think that is true.

Q. (By Mr. Barnard): Dr. Sessions, will you confine your answer to this particular question to a yes or no.

(Testimony of Dr. Alwyn C. Sessions.)

A. Then you have to state the question as to the date I was in the orchard. The question was involved; my answer was a little involved.

Q. My question is, Doctor, whether or not during your visits, your two visits to the Grimm orchard in early April of 1957 and your second visit in either late April or early May, 1957, from your observations of that orchard you were able to reach a conclusion in your own mind as to the cause of the condition?

A. No, not definitely the cause. I was sure it wasn't oil burning.

Q. Very well. Now, are you acquainted with a disease commonly known as bacterial canker?

A. Yes, I am.

Q. Have you done any research or studying or experimentation in connection with that disease?

A. Yes, I have.

Q. Does it occur elsewhere other than in the State of California?

A. It occurs in England, it occurs throughout the United States, in most of the stone fruit areas, northwest, [409] and is becoming more serious in California. It is particularly abundant along the Pacific Coast in our states.

Q. Does it occur in all types of climatic conditions?

A. Yes, if you say all types, the types that would grow stone fruits.

Q. Does it occur in areas where stone fruits are being grown with all types of soil conditions?

(Testimony of Dr. Alwyn C. Sessions.)

A. Yes, I have seen it on some of the heaviest soils in Modesto, up near the eastern mountains, I have seen it in some of the sandiest soils we have, right at Atwater and also at Clovis, and I have it in the Grimm orchard which is rather sandy loam soil so it would be classified.

Q. Does the disease bacterial canker also appear, regardless of the particular agricultural practices that have been carried on in the particular orchard, and by that may I explain myself? I am referring to irrigation, cultivation and things of that type.

A. If we over-irrigate in the winter time and the trees are—roots are in water it is like all the other bacterial diseases that stimulates bacterial growth, and under those conditions, especially in the spring following a fall of that type we have apparently more of this disease, this type of disease, and that has occurred, sometimes we call it sour sap when the water flows over the trees, and it is given many—several names, this type of disease.

Q. Now, you are familiar, are you not, with the soils in the Clovis area?

A. I am fairly well familiar.

Q. And in particular the soils on Mr. Ogden's ranch?

A. I have been over Mr. Ogden's ranch several times. I have never actually seen a soil survey, if I may say that, where we determine the classification and the soil survey like we used to make the soil, U. S. survey.

(Testimony of Dr. Alwyn C. Sessions.)

Q. And are you familiar with the soil conditions in other peach growing areas of Fresno County?

A. As familiar as anyone would be that didn't actually I think make the survey, or have—I don't mean a chemical analysis, I mean a soil survey.

Q. Are you familiar with the soil conditions in Mr. Grimm's orchard?

A. To what I could see by digging with a shovel, by walking over it, by pulling up weeds, to see if I could see certain things. I never was able to pull a tree out, that was too deep, but in order to get a picture of it I was able to have some samples taken down to 12 feet.

Q. Now, in your opinion, would there be any substantial difference in the effect of bacterial canker upon an orchard in the peach growing area of Fresno County and Mr. Grimm's orchard, because of varying soil conditions and climatic conditions? [411]

A. Well, if there was we couldn't identify something in Bakersfield with something in England or some other place. There is nothing.

Q. Now, Dr. Sessions, you are familiar with the product known as Mitox? A. I am.

Q. Is there any metallic sulfur in Mitox?

A. There is absolutely none.

Q. Is there any danger because of sulfur in using Mitox with a foliage oil?

Mr. Hamilton: I am going to object on the basis that it would be an opinion and conclusion of the

(Testimony of Dr. Alwyn C. Sessions.)

witness who being a chemist is not qualified to give.

The Court: Well, I will overrule the objection to the question.

The Witness: There is—you will have to ask the question over.

The Court: Read the question.

(Question read.)

A. There is no elemental sulfur in it; there is no danger; it is not around, it doesn't exist.

Q. (By Mr. Barnard): Can you explain that answer?

A. Yes, I think I can. Metallic sulfur or elemental sulfur, as they call it, is quite different than the sulfur [412] when it is combined in a molecule. For instance, and I can say we have to go from the known to the unknown, if I add common salt here and you say sodium is in it and sodium is lye I would have to say yes. Now, if you say metallic sodium I say no, because it is hooked with chlorine to form common salt. Now, in these organic chemicals we don't take the elemental sulfur, it usually comes from a salt, you see we have copper sulfate, we use that in a spray, we never think of it as sulfur, you see it is the radical but not the elemental. Now when we take that sulfur and combine it with the organic chemicals I could list—I have listed here most of our organic chemicals, add sulfur, we use for spray, and this radical sulfur combines the sulfur and when we hook them together it is exactly like we hook sodium, lye,

(Testimony of Dr. Alwyn C. Sessions.)

chlorine and hook them together, there is no metallic sodium; neither is there metallic sulfur. Most of the organic chemicals that we have with our sprays today are—do carry this combined sulfur. Nicotine sulfate, same thing, it is combined sulfur. I could name many of them. I listed them somewhere if you wish them.

Q. Now, Dr. Sessions, if an oil spray was applied to a peach tree in a sufficient quantity to damage the tree, would it be normal to expect to find one or two limbs on that tree damaged, or would the whole tree be damaged?

A. When we spray a tree as Mr. Grimm has testified, [413] the sprayer,—the best way to spray is the way he did. The sprayer goes ahead with 50 foot hose and the man walks around, and sprays, and you watch to see that every limb is wet equally. Now, when we have injury with the spray we not only get uniform injury to the tree, but we get uniform injury—if we did get injury—and when I say injury I mean again from a dormant oil, because you wouldn't ever see this on summer oil, but if we put heavy enough dormant oil to get injury we either see the whole orchard—I guess he sprayed the whole orchard, we usually do not, where we see the injury, the type of injury, if I may say, it is like some man who puts the agitator to work—now, I don't know, maybe I am going too far with this, but if the agitator did the work and then you had the oil all coming out, maybe 15 gallons, we would see it, at the end of every

(Testimony of Dr. Alwyn C. Sessions.)

time you would find, or sometimes the sprayer, they dump the oil in first, start the engine, shoot the oil out in the hose, out here, heavy dormant oil, and then they put the water in the tank and start the agitator, and the first trees they spray from the tank, the first hundred—no, not a hundred, 20 trees down the row you see 20 trees, you would see that, and you told them not to put the oil in if it was a heavy dormant oil until some water got in the tank. Now, I have seen that kind of injury.

Now, of course I have produced this many, many times, [414] this type of injury, but it is always uniform around the tree.

Q. Dr. Sessions, have you examined and are you familiar with the chart which is identified as Plaintiff's Exhibit No. 1?

A. I sit at the back, I have noticed the chart as I walked up here. I am not sure as to the actual directions on that. Now, I know that the Xs represent trees that are not hurt; one under the X represents one scaffold limb, two represents two scaffold limbs, three represents three scaffold limbs, and you have got some Ss there which are stumps, I think.

Q. Now, Dr. Sessions, for your information, the top of the chart is north.

A. The top is north. Now, that is confusing, I wonder if we could have depicted where the house is? What corner is the house?

Mr. Hamilton: I would be happy to point out

(Testimony of Dr. Alwyn C. Sessions.)

to Dr. Sessions, that the house sets, I believe, approximately in the center of the orchard, over on the right hand side, probably 40 yards (indicating).

The Witness: Then would the road be along the bottom of this map, the cement road, macadamized road?

Mr. Hamilton: This is the southerly side. The road would be here. [415]

The Witness: That is good. Now ask your question. I am acquainted with that orchard now.

Q. (By Mr. Barnard): Dr. Sessions, do you see, examining that orchard, any pattern which is at all consistent with any spray injury?

A. No, that chart proves conclusively to me it couldn't be a spray injury. I could tell you the reason if you wish.

Q. Will you tell us why?

A. If this was a spray injury, and I take it they start at the house end and go down through the rows, that is normally the way it would be, if it was a spray injury it would—with a heavy dormant oil again, the spray injury would have been on the blossom—I mean the blossoms wouldn't have come out, the buds would have dropped, the twigs, the little twigs would have been injured, and you would have uniform injury clear down on each row. Now, if you look there on the chart, for instance, I was just noticing a minute ago, one of those, about the third row from the top, we move along, we get a few there at the first part and then the whole row

(Testimony of Dr. Alwyn C. Sessions.)

has nothing. Now, that is about four tanks of spray, spraying at the time, and if you go this way you will find out this way practically every row has some, the bottom row has, the outside row, but if you start down this way there is no correlation at all. [416]

Q. So we can keep this in the record, Doctor, the first "this way" that you refer to——

A. Was east and west, the first would be down the long ways of the rows, now that is the way the water runs and that is the way we spray. Now you look down the long way of the rows and see how inconsistent it is for uniformity, some rows have no injury, sprayed with the same spray, same men put it on, one tree not burned, the other is, uniform in every respect. Now then, if you think of it as some trouble that carried by the wind, or rain, or irrigation water, they go this way, long way of the row, that is consistent. But it is certainly not consistent with any spray burn in any way.

Q. Dr. Sessions, a while ago in answer to one of my questions, you stated that there were two types of oil and you started to discuss the possible oil injury from the dormant type of oil. I may be wrong, but I don't recall that you completed the answer and that you discussed what possible injury could be done by a summer foliage oil.

A. I wonder if I may have a sample of our dormant oil, and if permissible, and our summer oil. I don't care whether it is in evidence or not.

(Testimony of Dr. Alwyn C. Sessions.)

Mr. Barnard: Well, the Court does. I will ask the Clerk to mark it.

Q. First, Dr. Sessions, I will hand you a bottle which [417] has been marked Defendant's Exhibit H for identification. Do you know what that is?

A. I do.

Q. What is it?

A. It is the oil from which clean-up, a dormant oil of Cal-Spray is made.

Mr. Hamilton: Counsel, I didn't get that exhibit number.

Mr. Barnard: H. We offer this in evidence at this time.

The Witness: May I make a note here?

The Court: It will be received and marked Defendant's Exhibit H in evidence.

(The bottle referred to was marked as Defendant's Exhibit H and was received in evidence.)

Q. (By Mr. Barnard): Dr. Sessions, I will hand you Defendant's Exhibit B, which is the light summer oil, that is the oil that goes into the light summer oil, and Defendant's Exhibit H, and—

A. The question is how these were made and what makes the actual difference, or what was it?

Q. No, my question was that I believe you failed to complete your answer to an earlier question and explain to the jury what type of injury, if any, could be expected or inflicted upon a peach tree by the oil, Defendant's Exhibit B, the summer oil. [418]

(Testimony of Dr. Alwyn C. Sessions.)

A. This oil is a light oil, the same nature of the oil we have in cold creams, hair tonics, and all sorts of white oil. It is known as a white oil, we call it in spray a foliage oil. Now, a foliage oil is not normally used in the dormant period because it is too expensive. It is safe but it is too expensive. Now, this oil——

Q. You are referring to Defendant's——

A. Clean-up oil, the dormant, heavy dormant oil, is not refined as this is. Now, when this is applied in the dormant it will control the bugs, but this doesn't have the sulfinated residue this does.

The Court: I think, Mr. Barnard, instead of "this" and "this" you better have it identified.

The Witness: All right, the white oil doesn't carry the sulfinated resident.

Q. (By Mr. Barnard): You are referring to Defendant's Exhibit B?

A. Exhibit B doesn't have the sulfinatable residues in it that this dormant oil, Exhibit H, has.

Q. Now,——

A. Now, when we apply this oil can be absorbed in the tissue of the plant, can be absorbed until, you can concentrate it until you get into the tissue of the bean plant, I don't know which——

The Court: Which one are you referring to?

The Witness: The highly refined.

The Court: No, the exhibit number.

The Witness: Exhibit No. B. This of course, if you put this on a leaf, the next morning you would have a leaf actually caustically burned.

(Testimony of Dr. Alwyn C. Sessions.)

The Court: That is——

The Witness: That is clean-up, H.

Q. (By Mr. Barnard): That is Exhibit H. Now, Dr. Sessions, if you applied the foliage oil, which is Exhibit B, to an opened or opening bud on a peach tree what would happen?

A. I don't know whether it is permissible or not. I have this oil applied several years ago on leaves of a bean plant to show it moving out for 46 days and then photographed as it moved through and showed no injury. Now, if you put this on a bud as it emerges, four per cent, there would be no injury whatever. This is volitable, as the day warms up some dries up, the lighter oil, some goes through the plant as the plant grows and you would have no injury here, to say nothing of the limb. That is Exhibit B.

Q. In your opinion, would it be physically possible to apply enough oil of the type of Exhibit B to a Merrill Gem peach tree to damage the scaffold limbs and the trunk of that tree?

A. Yes, I could. I have seen it done on citrus. We [420] took a white oil similar to this, a little lighter, in the Riverside Experiment Station, sprayed with 10 to 15 gallons per hundred, 15 to 2000 gallons per acre—that seems like a heavy spray but it is not excessive as to citrus, completely wilting of citrus. The spray runs down the trees and after continuation of that for two years, probably putting on a total of four sprays, five sprays, they found that the roots where this

(Testimony of Dr. Alwyn C. Sessions.)

was accumulating, the roots were being hurt. There wasn't a killing of the scaffold limbs, but there was a decrease in the vigor of the tree, and so they had to quit the light oils, refined oils, and come back to lower dosages of some of this type of Exhibit B, which is used in citrus on foliage. When you say any concentration any way, you could hurt a tree most anything will if you put too much too often.

Q. Doctor, at a concentration of four per cent, that is four gallons per 100 of Exhibit B——

A. Could you injure?

Q. ——could you injure the scaffold limbs and trunk?

A. It would be absolutely impossible with one spray to do it.

Q. Have you tried, Doctor, to injure a peach tree with a spray of the type of oil of Exhibit B.

A. Both Exhibit B and Exhibit H many times. And recently, this spring, for instance, I have gone out and [421] applied this, and applied this, to peach trees.

Q. And by this——

A. Exhibit A and Exhibit B—Exhibit B and Exhibit H.

Q. Now, as I understood your answer this spray you applied was Exhibit B and Exhibit H?

A. That is right.

Q. To peach trees, at a four per cent concentration?

A. Four per cent, and more than once on the same tree.

(Testimony of Dr. Alwyn C. Sessions.)

Q. How many times did you spray the same tree?

A. With this one we sprayed twice—oh, I beg your pardon, with H Exhibit, clean-up, we sprayed twice, once of course and twice, and with this one I sprayed twice, with this one, but only one tree twice, because I knew what would happen.

Q. And you are referring now——

A. Light summer oil, Exhibit B.

Q. Did any damage result?

A. In neither case. I have the pictures showing the time it was sprayed in full bloom. I have the pictures taken day before yesterday, if it is permissible to show.

Mr. Barnard: Could we approach the bench, your Honor?

(The following proceedings were had at the bench, outside the hearing of the jury:)

Mr. Barnard: As I told you before those trees are in Fresno County, and I don't want to offer the pictures without [422] the Court's permission.

The Court: I think this, for the purpose of his statement, applying the two types of oil they showed no damage, I think that would be proper.

Mr. Barnard: How about the pictures of the other orchard?

The Court: As I originally indicated, yes.

Mr. Barnard: Very well.

(The following proceedings were had in the hearing of the jury:)

Q. (By Mr. Barnard): Dr. Sessions, you stated

(Testimony of Dr. Alwyn C. Sessions.)

that you had a picture—I am not sure whether you said a picture, or pictures—of the tree which you sprayed this spring with the oil which is designated here as Defendant's Exhibit B.

A. I hope I have them. I had them this morning.

Q. May I have them, please.

A. This is a series of pictures, I think; yes.

Mr. Barnard: I hand the Clerk a series of seven photographs and ask that they be marked for identification.

The Court: Let's mark them as one exhibit, what number would that be?

The Clerk: The next will be I.

The Court: Defendant's Exhibit I, A, B, C, D and so forth, until you have consumed the seven, for identification. As I understand, they relate to pictures of the tree Dr. [423] Sessions testified that he experimented with in the use of the dormant oil, and the foliage oil, is that right?

Q. (By Mr. Barnard): Is that correct, Dr. Sessions?

A. Some of the pictures are sprayed with both, and some are sprayed with one. I would have to identify the pictures in order to tell you how they were sprayed.

Q. But you can do so? A. Oh, yes, I can.

Q. Dr. Sessions, I will hand you Defendant's Exhibit I, which consists of seven photographs which are numbered I-1 through I-7 for identifica-

(Testimony of Dr. Alwyn C. Sessions.)

tion. Could you perhaps take just a moment and segregate those into chronological order.

A. I think that is the way they should be. This can go over here with this one.

Q. All right. Now, Dr. Sessions, you stated, I believe, that those pictures showed various stages——

A. That is true.

Q. ——of the trees that you sprayed this spring. Will you hand me then——

The Court: The stage of bloom?

The Witness: Development of the tree.

Q. (By Mr. Barnard): Those were over a period of how long a time?

A. The first spray was applied as dormant when they were— [424] February 14th, just a little—couldn't hardly call it pink, full pink stage, very few leaves out.

Q. Then was the——

A. Now the other spray that followed on top of these was sprayed March 25th, when many of the blossoms were in bloom.

Q. Doctor, we will go into the details of each picture later. When was the last picture taken?

A. The last picture was taken yesterday morning.

Q. Yesterday morning, April 10th.

A. April 10th, all right.

Q. Will you hand me the first picture?

A. Let's take this one here first. This is the second time. This is the stage of the peach when

(Testimony of Dr. Alwyn C. Sessions.)

the first spray was applied, the spray was a dormant spray, the H Exhibit.

Q. Very well. A. Four per cent.

The Court: Which one is that, I what?

Q. (By Mr. Barnard): You are referring to I-7?

A. That is the condition of the tree close-up so you see the condition of the blooms on these branches.

Mr. Barnard: Very well. Your Honor, shall I offer these one at a time.

The Court: No, I think it will probably be better to [425] put them all in at once.

Q. (By Mr. Barnard): Then, Doctor,—

A. This is the next one that was sprayed. Now, this tree has been sprayed twice, once with the aeromite Mitox, lead and oil as the Grimm was, and then some two weeks later come back and put it on again, but the first time it was sprayed with the heavy dormant oil. It was difficult to find an orchard that was not sprayed, so we went ahead and did it, twice.

Q. You are referring to Exhibit I-1?

A. That is right. Now, as to whether there was injury, this shows what the tree is today, if you have any scaffold limbs on there dead.

Q. This is I-2? A. I-2.

Q. Is this the picture that was taken yesterday?

A. That is the picture that was taken and that is the man that did the spraying standing beside it.

(Testimony of Dr. Alwyn C. Sessions.)

Q. And is this the same tree?

A. The same tree, you can identify it.

Q. All right. Now, referring to I-5.

A. I-5, that is a tree that is sprayed in full bloom, with the same combination that Mr. Grimm used.

Q. And I-4? [426]

A. That is the same tree at it appears today. I wish I could get a close-up to show you the fruit.

Q. What is I-3?

A. I-3, this is the one—this is the tree that was sprayed, at the time of the spraying you will notice the leaves are all out; that tree——

Q. I-6?

A. I-6, was sprayed about two weeks ago with the same thing, when the leaves were out, and the fruit was on the tree, that would be two weeks ago.

Q. What was I-3?

A. That is a duplication of the other where we sprayed in the full bloom. Every other tree along there is sprayed in the full bloom, and that is as the tree looks today.

Mr. Barnard: If the Court please, I offer Defendant's Exhibit I-1 through I-7 in evidence.

The Court: It will be received and so marked; received for the purpose of showing the experiments conducted by Dr. Sessions with respect to the two types of oil sprays.

Mr. Barnard: That is correct.

(The pictures referred to were marked as

(Testimony of Dr. Alwyn C. Sessions.)

Defendant's Exhibit I-1 to I-7, inclusive, and were received in evidence.)

Mr. Barnard: If your Honor please, I have completed my direct examination. I would like to show these to the jury. [427]

The Court: All right.

Mr. Barnard: Perhaps we could divide them up by rows.

(Exhibits passed to the jury.)

Cross Examination

Mr. Barnard: As I stated, I am through with my direct examination.

Q. (By Mr. Hamilton): Dr. Sessions, do you work under Robert K. Thompson?

A. Yes, he is in charge of the field men throughout the western United States, and I am stationed here at Fresno.

Q. You were at the Grimm ranch on how many occasions, sir, investigating this orchard?

A. Investigating the orchard three different occasions.

Q. Was that in the spring of 1957?

A. Twice in the spring of 1957, and once about three weeks ago.

Q. At any time did Mr. Grimm fail to cooperate with you?

A. No, not with me personally, except the last time I was with him, when the other men were there, I said I would like to see the roots of these trees and deeper down and see it, and I could see

(Testimony of Dr. Alwyn C. Sessions.)

or felt from the answer that he gave that he wasn't going to pull those trees out, not yet, so I went into other orchards and pulled trees out from other orchards.

Q. When you made the first visit down there, Dr. [428] Sessions, and after you had completed your examination, were you baffled at the cause of the condition of the orchard?

A. Yes, that was a very severe case of this disease.

Q. Did you have any suspicion of what it might be?

A. Yes, a very strong suspicion.

Q. You referred to "this disease"?

A. To that disease.

Q. And what do you mean?

A. A bacterial type of disease.

Q. Bacterial canker?

A. It would be hard to say exactly bacterial canker. I don't think I was absolutely sure it was that. There are four or five of those bacterial diseases, fuzeium wilt, oak root fungus, and then there is a large—what we call sour sap diseases, some of them we call gummosis. So you see, it is—we knew it was in the bacterial range, but which one I wouldn't say.

Q. At no time, sir, did you ever take any material, any representative samples of the diseased material, from the Grimm orchard for laboratory examination, did you?

A. I felt, and I have always felt, the best thing

(Testimony of Dr. Alwyn C. Sessions.)

to do is to look at the orchard and see the man, rather than take the samples.

Q. You don't go for all the folderol Dr. Weigle went through, taking samples and making cultures to find out [429] with—— A. No, I——

Q. ——pathological certainty——

A. ——say no man can sit in a laboratory and have a sample sent to him and designate exactly what bacterial disease is hitting the tree. Now, they testified they didn't find the bacteria disease in that.

Q. When Dr. Wilson, the old master of the disease since 1929—— A. All right, said what?

Q. ——spent nine years at it, and——

A. I am pointing out,——

The Court: Now, just a minute. You both can't talk at once. Dr. Sessions, let the counsel complete his question. When he has finished then you can answer.

Q. (By Mr. Hamilton): ——had before him a representative sample as selected by Mr. Hench, and detected no infectuous disease.

The Court: Now, what was your question?

Mr. Hamilton: That was the question. The question was, you disagreed with him?

A. No, I don't disagree with him. First place, he didn't know where the sample came from, and in the next place he knows as well as I do that oftentimes samples are sent and you cannot find these bacterial diseases when the sample is [430] sent in. It is not that simple or we wouldn't be work-

(Testimony of Dr. Alwyn C. Sessions.)

ing all this time to identify these diseases all over the United States. Let me show you the picture of what happened at Atwater, I could prove that.

Q. Dr. Sessions, did I understand you correctly to state that you took the light oil, represented by Defendant's Exhibit B, and placed that oil on a tender bean plant?

A. I did, concentrated, dropped concentrated oil on a tender bean plant leaf.

Q. So much on there that you could photograph it?

A. So much I could photograph it going through the leaves. Would you like to see them?

The Court: Now, just a moment, Dr. Sessions. You just answer the question, don't volunteer. If counsel wants to ask further questions he will, and if Mr. Barnard feels that he should ask questions, he will ask them.

Q. (By Mr. Hamilton): Without any damage to that plant?

A. Without any caustic burn or damage to that leaf, as we think of burning. I will have to explain that.

Q. Was there damage to the plant?

A. No. No.

Q. Was there any kind of damage?

A. Not what you think of damage. You ask what it was and I can tell you. [431]

Q. I understand it is your opinion that this oil could be sprayed on plants without regard to the quantity and it wouldn't injure them?

(Testimony of Dr. Alwyn C. Sessions.)

A. Now, now.

The Court: Just a minute. What oil are you referring to?

Mr. Hamilton: I was referring to the oil represented by Defendant's Exhibit B.

A. No, I never made such a statement in regard to the quantity, that would mean pouring it on any way.

Q. (By Mr. Hamilton): Would you say a 40 per cent mixture could be applied to peach trees without damage?

A. I said a spray carrying 40 per cent could be applied to a peach tree, that would be a mixture of half water with half oil, could be applied to a peach tree at the concentration Mr. Grimm put on, and it wouldn't kill the scaffold limbs and leave stumps in the orchard.

Q. But it would cause damage?

A. Yes, if there was any blossoms it would drop them, the tender twigs may be damaged with it.

Q. Then it is your understanding of that oil injury it occurs on the young wood, one year old and less, to the exclusion of the two year old and older wood?

A. Absolutely always, that is where we get our burn first. [432]

Q. I show you, Dr. Sessions, a picture marked and entered as Defendant's Exhibit I-1. Is that tree being sprayed with light oil, or dormant oil?

A. That tree is being sprayed with the same

(Testimony of Dr. Alwyn C. Sessions.)

combination Mr. Grimm sprayed his orchard with, a few weeks after it had received a full spray of dormant oil.

Q. Now, I ask you, sir, if you could, was that tree being sprayed with a light oil?

A. That tree was being sprayed with a light oil, summer oil, and the Mitox and the lead arsenate.

Q. What kind of a tree is it?

A. That is a peach tree.

Q. What variety?

A. The variety is Alberta, early Alberta.

Q. What age?

A. About a four year old tree.

Q. Located where?

A. Located on Temperance Avenue just north—just south of Butler, on Mr. Steinhauser's—in Mr. Steinhauser's peach orchard.

Q. Do I understand correctly, Dr. Sessions, that Defendant's Exhibit I-1, I-2 and I-7 are all of the same tree?

A. No. No, these two are the same tree.

The Court: Now which. Identify them.

The Witness: You read them. [433]

Q. (By Mr. Hamilton): Defendant's I-1 and I-2.

A. This tree as to showing how far it is in bloom, the blossoms are off the same tree he is holding.

The Court: What number is that.

The Witness: That is J-I. The blossoms—

(Testimony of Dr. Alwyn C. Sessions.)

The Court: Just a moment. It is what?

The Witness: J——

Q. (By Mr. Hamilton): I-7. Now, what kind of a tree is that?

A. This is still the—the blossoms he takes in his hand is off the tree I sprayed. The other is off another tree alongside of this tree.

Q. Do you know what variety that is?

A. Yes, this is a late Alberta. Now, the reason I did that is to show conclusively that there was even the later tree, was out in bloom, but not as far. The early Alberta, is the mother, I think, of the Merrill Gem.

Q. The Merrill Gem is a distinct variety of peach? A. Sure. It is——

The Court: I didn't hear.

The Witness: It comes from other varieties, of course. You don't pick it out of the air.

Q. (By Mr. Hamilton): I show you a picture marked or entered as Defendant's [434] Exhibit I-5, Dr. Sessions. What variety of peach tree is that? A. That is not a peach tree.

Q. What variety of tree is it?

A. That is a plum tree that is normally thought to be very sensitive to oil.

Q. Was it sprayed with a light oil?

A. That was sprayed with a light oil in the full bloom and you have the other pictures, it shows the complete picture, there was a little browning of the petals.

(Testimony of Dr. Alwyn C. Sessions.)

Q. Then the tree depicted in Defendant's Exhibit I-4 is also a plum tree?

A. That is the plum tree, one of the most sensitive for oil we have.

Q. The tree depicted in Defendant's Exhibit I-3, what kind of tree is that?

A. That is a plum tree. Every other one was sprayed in full bloom.

Q. Those are plums? A. Those are plums.

Q. And the tree depicted in Defendant's Exhibit I-6. A. That is a peach tree.

Q. Of what variety?

A. That is a peach tree of a Guam variety, at least that is what I am told it was. I couldn't testify to it. [435]

Q. Did you conduct these experiments for the purpose of using the results here?

A. That is the only reason I put them, because I have done it so many times it seemed foolish to do.

Q. And you used plum trees, Albert peaches—

A. I used plum trees, plum trees were in full bloom, and I used these others because we knew that they were in full bloom, they were there, they had no oil on them, they were in full blossom, they had been sprayed once. I wanted to show we could put another oil on top, and that is why I used them. I didn't know whether they were going to be used or not, I will be honest with you there, but I took some pictures.

(Testimony of Dr. Alwyn C. Sessions.)

Q. Dr. Sessions, of your foliage oils, your company sells various grades, does it not?

A. Yes, oil——

Q. Medium? A. Medium.

Q. Medium light? A. Light medium.

Q. Light medium. Light? A. Light.

Q. And the medium is the heavier of——

A. No.

Q. ——the foliage oils? [436]

A. No, there are several that are heavier. The bulk oils are heavier, and medium heavy is heavier.

Q. In other words, there are further degrees of—— A. Heavy.

Q. ——viscosity? A. Correct.

Q. But the trees depicted in your experiments were sprayed with the use of light oil?

Q. The bulk medium, which is what we call the light oil against the clean-up oil.

Q. You have referred to the light oil all during your testimony. A. The light oil——

The Court: Just a minute, don't be talking at once. Ask your question.

Q. (By Mr. Hamilton): The oil sold to Mr. Grimm was a medium oil.

A. Correct, but it compares with the two samples I had on my hands, Exhibit B and Exhibit H, and then we compared those two, I would say the light oil, because it is much lighter than the heavy dormant oil. Now, even so, medium oil stands between the heavy—we have heavy white oil and we have lighter white oil. Now, of course,

(Testimony of Dr. Alwyn C. Sessions.)

the oils are used more extensively than any other spray, and so we have this whole field to fit over all the characteristics [437] in the agricultural spray industry.

Q. Dr. Sessions, in the spring of 1957, the formula four per cent Ortho-K medium oil, four pounds lead arsenate, and two pounds of Mitox per 100 gallons of water, was that a standard formula widely used in the San Joaquin Valley.

A. May I ask it this way: it had been used in England five years.

The Court: No, I think——

The Witness: All right, then I will say, what do you mean by standard. Let me get that.

Q. (By Mr. Hamilton): Was it a commonly used formula?

A. Not too extensively because we couldn't get it. It was on our spray programs, we recommended it.

Q. It was relatively new?

A. What is it?

Q. It was relatively new?

A. If being discovered five years before was new.

Q. Now, this spray formula, was it one that was generally recommended for use in peach orchards?

A. It is, there is where it is predominantly used and being used now.

Q. No, I am talking about 1957.

A. Let me ask you this question: do you mean

(Testimony of Dr. Alwyn C. Sessions.)

predominantly used by the amount of Mitox that was manufactured, [438] or whether the majority of orchards in this Valley was sprayed with it?

Q. Sir, I am not talking about Mitox. I am talking about the formula recommended to Mr. Grimm, four per cent medium oil, four pounds of basic lead arsenate, and two pounds of Mitox, used in 100 gallons of water, as a spray on peach orchards. The question, if I may repeat it, in the spring of 1957, was this particular mixture or formula one that was generally recommended for use on peach orchards? A. Where?

Q. In the San Joaquin Valley.

A. North of Bakersfield, we would be included in that clean-up. In Bakersfield, I wouldn't say most, but a large number of the growers used the Ortho-K medium, other than that.

Q. Would it be possible to give a yes or no answer to my question, Dr. Sessions?

A. If you will define it. When you say generally, it is quite a large thing, must be generally over all the orchards, no, not with Mitox in it. Generally with an oil spray of some kind, yes. With lead arsenate, yes.

Mr. Hamilton: Counsel referring to page 47, line 11.

Q. You remember, Dr. Sessions, when your deposition was taken.

The Court: Just a minute, Mr. Hamilton. Don't carry on a private conversation with the witness. Speak out. [439]

(Testimony of Dr. Alwyn C. Sessions.)

Q. (By Mr. Hamilton): Do you remember, Dr. Sessions, when your deposition was taken?

A. I do.

Q. You were under oath?

A. I was under oath.

Q. Would you read on page 47, commencing with line 11——

A. Line 11.

Q. ——through line 16. Now, read it to yourself.

A. How far down?

Q. From line 11 to line 16.

A. Yes. That is my testimony.

Q. Now, will you go back to page 46, to line 22.

A. Wait just a moment, now. The testimony I gave today. Line what?

The Court: 22.

Mr. Hamilton: Page 46.

The Witness: To myself?

Mr. Hamilton: Yes, and read from there down to where you started in, line 11 on page 47.

The Witness: I have read it.

Q. (By Mr. Hamilton): Do you recall being asked those questions and——

A. I do.

Q. ——giving those answers? [440]

A. I do.

Q. "Is the formula four per cent Ortho-K medium flowable, four pounds of lead arsenate, and two pounds of Mitox to each 100 gallons of water a mixture that is generally used in the San Joaquin Valley?

"No, it is not a mixture that is generally used

(Testimony of Dr. Alwyn C. Sessions.)

in the San Joaquin Valley. It is a mixture that may become generally used, but it is relatively new. We are very hopeful that it will be used rather generally."

A. That was because Mitox was in it.

The Court: Just a minute. Proceed, Mr. Hamilton.

Mr. Hamilton: At line 11, page 47, "In the spring of 1957, Dr. Sessions, was this particular mixture or formula one that was generally recommended for use on peach orchards?"

"A. It was not generally recommended, no. It was never written in a spray program for that year, although it was reported as being efficient in other areas." A. May I ask the date?

The Court: The date of the deposition?

The Witness: Yes.

The Court: Well, it is right on it.

Mr. Hamilton: December 13, 1957.

The Witness: That was right at that date; it was not [441] generally used; Mitox was not too available.

The Court: I think, members of the jury, we will take our afternoon recess.

Mr. Hamilton: Your Honor, I believe I am through. I have one more reference to the deposition to look at and I believe it has been cleared.

The Court: All right.

Mr. Hamilton: I have no further questions, your Honor.

(Testimony of Dr. Alwyn C. Sessions.)

The Court: Members of the jury, we will take our afternoon recess, and keep in mind the admonition I have given you.

(Short recess.)

The Court: The jury is present?

Mr. Hamilton: So stipulated, your Honor.

Mr. Barnard: Yes, your Honor.

Redirect Examination

Q. (By Mr. Barnard): Dr. Sessions, I have just one question: when in answer to questions propounded by Mr. Hamilton concerning the trees depicted in Defendant's Exhibit I-1 through I-7, you referred to using light oil. Were you referring to Ortho-K medium flowable oil?

A. I was referring always to Ortho-K medium flowable oil, when I used the term light oil.

Mr. Barnard: That is all. [442]

The Court: That is all, Dr. Sessions.

(Witness excused.)

Mr. Barnard: Now, if the Court please, subject to an offer of proof to which I have referred the Court previously, the defendant rests.

Mr. Hamilton: I have one witness in rebuttal, your Honor.

The Court: Very well.

Mr. Hamilton: We will call Tim Hanna.

JOHN LINDSAY TIMOTHY HANNA
called as a witness by plaintiff in rebuttal, having
been previously duly sworn, was examined and
testified as follows:

Direct Examination

Q. (By Mr. Hamilton): Mr. Hanna, were you
at the Grimm ranch with Mr. Fisher, the manager
of the Bakersfield office of the Cal-Spray office
late in April, 1957? A. Yes, I believe so.

Q. And did you participate in a conversation
between Mr. Fisher and Mr. Grimm, in the Grimm
orchard on that day?

A. I beg your pardon? I didn't—

The Court: Did you participate.

Q. (By Mr. Hamilton): Did you take part in
a conversation? A. Yes, sir.

Q. Did you hear Mr. Fisher state to Mr. Grimm:
do not [442] worry, the man from Richmond with
the checkbook will be down and settle with you?

A. I remember hearing some such statement
out there when I was with Mr. Grimm and Mr.
Grimm's foreman and Mr. Fisher and me.

Q. Now, it doesn't necessarily mean that those
exact words were used, but was that the content
or import of Mr. Fisher's statement?

A. To some statement to that effect was made,
yes.

Q. By Mr. Fisher?

A. If I remember correctly, yes.

Q. Did you, Mr. Hanna, in your capacity as an
employee of Cal-Spray, write Mr. Fisher a mem-

(Testimony of John Lindsay Timothy Hanna.)
Memorandum recommending disposition of Mr. Grimm's claim?

The Court: I think if I recall the testimony, you should have it "on a monetary disposition". Well, disregard my suggestion. Read the question, Miss Schulke.

(Question read.)

A. I put an interoffice memorandum on Mr. Fisher's desk to that effect.

Q. (By Mr. Hamilton): To what effect?

A. That I thought it ought to be—I would recommend that he would recommend it should be settled and taken care of and cleaned up. [443]

Mr. Hamilton: I have no further questions, your Honor.

Cross Examination

Q. (By Mr. Barnard): Mr. Hanna, you were in the sales department of Cal-Spray at that time, were you not?

A. That is correct.

Q. So is Mr. Fisher?

A. That is correct.

Q. And claims of this type are embarrassing to a sales department, are they not?

A. That is correct.

Q. And the sooner a claim of this type is cleared up, so you can sell goods without such a claim hanging over your head, the better you like it?

A. That is correct.

Mr. Barnard: I have no further questions.

Mr. Hamilton: No further questions.

The Court: That is all.

(Witness excused.)

Mr. Hamilton: The plaintiff rests, other than I should like to move to amend our prayer for relief in our complaint to correspond with the proof that has been adduced in the trial.

The Court: I think you might prepare, Mr. Hamilton, such a document, and furnish a copy to Mr. Barnard, and I [444] will consider that Tuesday morning, at 9:00 o'clock.

You have no further evidence?

Mr. Hamilton: No.

The Court: You have no further evidence except the offer of proof?

Mr. Barnard: None, your Honor.

The Court: Members of the jury, both sides, so far as you are concerned, have completed their testimony in this case. The next step, of course, is the argument of counsel, and the next step is the instructions of the Court and then the case is given to you for your deliberation and decision.

(Admonition to jury, and jury excused until Tuesday, April 15, 1958, at 9:30 a.m.)

The Court: Let the record show the members of the jury have departed from the court room. Before lunch, Mr. Barnard made an offer of proof with respect to certain testimony adduced through the witness, Mr. Ogden. Counsel for the defendant objected to the receipt of the offer of proof. The Court stated that it would take the matter under advisement and rule later.

The Court has considered the offer of proof, and the Court will now reject that offered testimony.

Now, Mr. Barnard, I understand you have another offer of proof.

Mr. Barnard: Yes, if the Court please, through Dr. [445] Sessions I would like to produce testimony as to the condition of the Ogden orchard in 1957, the same one the Court has already ruled on. And that testimony, of course, would involve the pictures which were marked for identification, but not admitted.

I would like to produce through Dr. Sessions also testimony concerning the condition of the Elmer Woods orchard at Atwater, California.

The Court: I assume you are talking about Elmer Woods' peach orchard?

Mr. Barnard: Elmer Woods' peach orchard at Atwater, and introduce pictures concerning the condition of that orchard in 1957. And I would like to produce through Dr. Sessions testimony concerning the condition of the California Packing Corporation peach orchard in Merced, California, along with pictures and slides of the condition of that orchard in 1957, the spring of 1957.

Mr. Hamilton: To which I would object on the basis of relevancy and materiality, no similarity.

The Court: Well, the Court will make the same ruling with respect to the offered testimony to be introduced through Dr. Sessions that it has already made with respect to Mr. Ogden. The Court will reject the offer of proof.

Now, is there anything further, gentlemen?

Mr. Barnard: Nothing, your Honor. [446]

Mr. Hamilton: Unless at this time the Court

would desire to go into the question of the instructions.

The Court: Yes, because I will expect counsel to be prepared to argue the case starting at 9:30.

(Further discussion.)

(Adjournment at 4:00 p.m. April 11, 1958 to 9:30 a.m., on April 15, 1958.) [447]

Tuesday, April 15, 1958. 9:30 A.M.

(Stipulated jury present.)

(Opening argument by Mr. Hamilton.)

(Argument by Mr. Barnard.)

(Closing argument by Mr. Hamilton.)

The Court: Now, Mrs. Wailes and gentlemen, I guess it was last Tuesday you took the oath to well and truly try this case and base a true and just verdict on the law and the evidence. You have heard the testimony produced by the parties, and you have heard the argument of counsel, and it becomes now my duty to instruct you on the principles of law that apply to this case, and it is your duty as jurors to follow the law as I state it to you. On the other hand it is your exclusive province to determine the facts in the case, and to consider and weigh the evidence for that purpose. The authority thus vested in you is not an arbitrary power, but must be exercised with sincere judgment, sound discretion, and in accordance with the rules of law as I state them to you.

If in these instructions, any rule, direction or idea be stated in varying terms, no emphasis thereon

is intended by me and none must be inferred by you. For that reason, you are *not single* out any certain sentence, or any individual point or instruction, and ignore the others, but you are to consider all of the instructions and as a whole, and to [449] regard each in the light of all the others.

Although you, as jurors, are the sole judges of the facts, you are bound by your oath to follow the law as stated to you in these instructions and to apply the law so given to the facts as you find them to be from the evidence before you.

You are not to be concerned with the wisdom of any rule of law that I state to you. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty as jurors to base a verdict upon any other view of the law, than that given in the instructions of the Court.

Now, as I have repeatedly told you throughout the trial of this case, the statements and arguments of counsel are not evidence in the case, unless made as an admission or stipulation of fact. When the attorneys on both sides stipulate or agree to the existence of a fact, then the jury must accept the stipulation as evidence and regard that fact as stipulated to as conclusively proved.

The evidence in the case consists of the sworn testimony of the witnesses, all exhibits which have been received in evidence, all facts which have been stipulated to, and all applicable presumptions stated in these instructions. Any evidence as to which an objection was sustained by the Court, and any

evidence ordered stricken by the Court, must be [450] entirely disregarded.

You are to consider only the evidence in the case, and the instructions, and the applicable presumptions. But in considering them you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such inferences as seem justified in the light of your own experience as men and women.

At times during the trial I have been called upon to pass upon whether certain offered evidence might properly be received or not. You are not to be concerned with the reasons for such rulings and are not to draw any inferences from my rulings. If I reject offered evidence, you must not speculate as to the reason counsel may have had in mind in offering it, you must not speculate as to what the answers to questions that were objected to might have been, and so evidence that has been rejected you must not consider it at all in any way. It is, of course, the duty of an attorney, when the other side offers testimony or other evidence which counsel feels to be not properly admissible, to object. In admitting evidence to which an objection is made, I, of course, do not in any way pass upon the weight of the evidence, and the fact that I may rule one way or the other does not indicate any view that I may have with respect to the weight or the effect of evidence. You are the sole judges of the [451] facts and the sole judges of the credibility of witnesses.

If during this trial I have said anything or done anything which has suggested to you that I am inclined to favor the claim of either party to this action, you will not suffer yourselves to be influenced by any such suggestion. If I have made any comments, or asked questions of witnesses, do not feel I have any views on the matter. Sometimes I ask questions or make statements solely in the belief it might be of assistance to the jury in receiving or considering the evidence. If I have made any comment as to the value or effect of evidence, and I don't recall that I have, you will not be influenced thereby. You are the sole judges, and if you feel I have made some statement, it is solely within your province to reject that statement or give it such weight as you may think it is entitled to.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action.

Now, the defendant in this action is a corporation, and as such can act only through its officers and employees, who are its agents. The acts and omissions of an agent, done within the scope of the agent's authority, are, in contemplation of law, the acts and omissions respectively of the **corporation** whose agent he is.

The fact that the defendant is a corporation must in no [452] wise prejudice you in your deliberations or in your verdict. In a court of justice, such as this, jurors may not discriminate between corporations and natural individuals. Both natural

persons and corporations are persons in the eyes of the law, and both are entitled to the same fair and impartial consideration as to justice by the same legal standards at your hands. You have no authority to tax the defendant corporation for the benefit of another person, solely because one of the parties happens to be a corporation, and you must deliberate and consider this case just as though there were two natural persons involved in this action.

Now, as I have stated before, you are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by contradictory evidence. You should carefully scrutinize the testimony given by each witness, the circumstances under which each witness has testified, and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive, and state of mind, and demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner *in each* witness might be affected by the verdict; and the [453] extent to which, if at all, the testimony of each witness is either supported or contradicted by other evidence.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to dis-

credit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy or inconsistency, consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or wilful falsehood. If you find the presumption of truthfulness as to any witness to be outweighed, by these considerations, you will give the testimony of that witness such credibility, if any, as you may think it deserves.

A witness may be discredited or impeached by contradictory evidence; or by evidence that at other times the witness has made statements which are inconsistent with the witness' present testimony. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to [454] distrust such witness' testimony in other particulars; you may reject all of the testimony of that witness or give that testimony or such parts of it such weight as you feel it deserves.

Any evidence that has been received of an act, omission or declaration of a party or its agent which is unfavorable to his or its own interests, should be considered and weighed by you like any other admitted evidence, but evidence of the oral

admission of a party, or its agent, other than the testimony of a party or its agent in this trial, ought to be viewed by you with caution.

You are not bound to decide this case in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the declarations of a lesser number, or a presumption of other evidence, which appeals to your mind with more convincing force. This rule of law does not mean that you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side or another. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on one side or the other. It means that the final test is not in the relative number of witnesses, but in the relative convincing force of the evidence. [455]

The testimony of one witness worthy of belief is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony, even if a number of witnesses have testified to the *contrary*, if from a consideration of the whole case, considering the credibility of witnesses and after weighing the various factors of evidence, you conclude that the balance of truth and probability point to the accuracy and honesty of that one witness.

Ordinarily the rules of evidence do not permit the opinion of a witness to be received as evidence. An exception to this rule exists in the case of expert witnesses. A person who by education, study and

experience has become an expert in any art, science or profession, and who is called as a witness, may give his opinion as to any such matter in which he is versed and which is material to the case. You should consider such expert opinion and should weigh the reasons, if any, given for it. You are not bound, however, by the opinion of the expert witness. Give it the weight to which you feel it is entitled, whether that be great or slight, and you may reject it, if in your judgment, the reasons given for it are unsound.

Evidence may be either direct or indirect. Direct evidence is that which proves a fact in dispute directly, without an inference or presumption, and which in itself, if true, conclusively establishes the fact. Indirect [456] evidence is that which tends to establish a fact in dispute by proving another fact which, though true, does not of itself conclusively establish the fact in issue, but which affords an inference or presumption of its existence. Indirect evidence is of two kinds, namely, presumptions and inferences.

A presumption is a deduction which the law expressly directs to be made from particular facts. For instance, a presumption is that a person speaks the truth, that is the presumption. That presumption may be overcome, but unless overcome by other testimony, the jury is bound to follow the presumption and that continues in effect until it is outweighed by testimony to the contrary.

An inference is a deduction which the reason of the jury draws from the facts proved. It must

be founded on a fact or facts proved and be such a deduction from those facts as is warranted by a consideration of the usual propensities of men, or the particular propensities of the person whose acts are under review by the jury.

In this case the parties have stipulated and agreed to the existence of the following facts which must be accepted by you as established facts in this case without further proof. These facts are:

1. That the defendant, through its authorized agents, inspected the peach orchard owned by plaintiff in January or February, 1957, and discovered certain destructive insects [457] therein and advised plaintiff of their findings, and that other destructive insects were likely to invade plaintiff's orchard.

2. That the defendant, through its authorized agents, recommended to plaintiff the use of 4% Ortho Light Medium Oil, 2 pounds of Ortho Mytox and 4 pounds of Ortho basic lead arsenate per 100 gallons of water, as a spray mixture to be used to control the insect pests present or likely to invade plaintiff's peach orchard, and recommended to plaintiff that said spray mixture be applied at the rate of 400 gallons per acre when his peach orchard was in the pre-pink-bud stage.

3. That the defendant sold and delivered to plaintiff a sufficient quantity of Ortho Light Medium Oil, Ortho Mytox and Ortho basic lead arsenate to cover his said peach orchard in accordance with the spray program recommended by the defendant for the purpose of plaintiff's using the same as an insect spray in his peach orchard.

4. That plaintiff used some, but not all, of the above mentioned agricultural chemicals as an insecticide and did spray the same upon his peach orchard.

As a result of the foregoing stipulation of facts, there remain only two issues of fact, the existence of which have not been stipulated or agreed upon by the parties.

These two issues are: [458]

First, was the application of the chemical spray to plaintiff's peach orchard the proximate cause of the injury, damage or illness of plaintiff's peach orchard?

Second, the extent, nature and amount of damages suffered and sustained by the plaintiff.

Now, if, under the evidence received in this case, and the principles of law given to you in these instructions, you are not satisfied by a preponderance of the evidence that the application of the chemical spray was the proximate cause of the injury, damage or illness of plaintiff's peach orchard, you must return a verdict in favor of the defendant.

If, however, under the evidence received in this case and the principles of law given to you in these instructions, you are satisfied by a preponderance of the evidence that the application of the chemical spray was the proximate cause of the injury, damage or illness of plaintiff's peach orchard, then and in such event, you must return a verdict in favor of the plaintiff and against the defendant for the amount of money that you find from a preponderance of the evidence the plaintiff has suffered and

sustained by reason of the application of the chemical spray to plaintiff's peach orchard.

Now, the proximate cause of an event is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the event, and without which the [459] result would not have occurred; it is the efficient cause, the one that necessarily sets the other causes in operation.

In order for the plaintiff to recover a verdict in his favor and against the defendant, the burden of proof rests upon the plaintiff to establish the existence of the two issues of fact stated in these instructions, by a preponderance of the evidence. "Burden of Proof" means that if no evidence were received on either side of such issues of fact, your findings as to them would have to be against the plaintiff and in favor of the defendant. When the evidence is contradictory, your decision must be made according to the preponderance of the evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issues preponderates, then your finding must be against the plaintiff.

The mere fact that an injury or disease to plaintiff's peach orchard occurred shortly following the application of a chemical spray supplied by defendant does not in and of itself raise a presumption that the injury or disease was caused by the chemi-

cal spray. The burden of proving such causation is upon the plaintiff, and unless that burden is [460] met by a preponderance of the evidence, your verdict must be for the defendant.

You are instructed that if from all the evidence in the case it is impossible for the jury to ascertain what was the cause of the injury to or disease suffered by the plaintiff's peach orchard without indulging in guess or conjecture, the jury must reach a verdict for the defendant.

Now, if you find from a preponderance of the evidence which has been presented to you, that the damage to the plaintiff's peach orchard was proximately caused by all or any part of the spray materials which he obtained from the defendant and applied to his orchard in accordance with the defendant's recommendations, then the plaintiff, Charles W. Grimm, is entitled to have and recover from the defendant, California Spray-Chemical Corporation, a sum sufficient to compensate him for all of his losses, directly and naturally resulting, in the ordinary course of events, from that damage. The plaintiff's losses in such event would include, if you find from a preponderance of the evidence that any or all of such losses occurred, the permanent reduction in the fair market value of his peach orchard, all of his extraordinary or unusual expenses in caring for his orchard, arising from the damage, including the reshaping and protection of his trees and the removal and disposal of dead plant material, and the net value to him of all such [461] peaches as the plaintiff would have produced in

the ordinary course of events, if the injury to his peach orchard had not occurred. But I caution you that each and all of the elements of damage which I have enumerated must be clearly ascertainable as to their nature and origin, and must not be based upon guess, conjecture or surmise.

If you should decide that the plaintiff is entitled to recover, although the amount of the verdict is left to your sound discretion, your award must be just and reasonable, and must be based upon the evidence introduced. This does not mean that any witness should have expressed an opinion as to the amount of pecuniary loss suffered by the plaintiffs. It means that your judgment must not be arbitrary or fanciful, but must have evidence behind it.

If you should find that the plaintiff is entitled to recover damages, then whether or not you may award him any sum for possible future detriment will depend on whether or not you find from the evidence that such detriment is reasonably certain to be suffered as a proximate result of the spraying of the plaintiff's trees. If it is, then plaintiff should be compensated for it. If it is not, then no award should be made for future detriment.

The amount of damages prayed for is \$22,537.86, but this allegation is merely a claim, and is not evidence, and must not be considered by you as evidence in the event you [462] should undertake to determine the amount of plaintiff's damage.

I have instructed you on the subject of the measure of damages in this action because it is my duty to instruct you as to all the law that may become

pertinent in your deliberations. I, of course, do not know whether you will need the instructions on damages or not, and the fact that they have been given to you must not be considered by you as intimating any view of my own on the issue of liability, or as to which party is entitled to your verdict.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that all jurors agree. Your verdict must be unanimous.

It is your duty as jurors to consult with one another, and to deliberate with a view to reaching a verdict, if you can do so without violence to your individual judgment. Each of you must decide the case for himself or herself, but you should do so only after an impartial consideration of all of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to change your mind if convinced that your opinion is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors, or solely for the mere purpose of returning a verdict.

Remember you are not partisans in this matter. You are [463] judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

Now, upon retiring to consider your verdict you will select one of your number to act as foreman or forewoman. The person selected will preside over your deliberations and be your spokesman in court.

I have prepared forms of verdict, which I will hand to you.

One verdict is in the form, with the title of this Court, United States District Court, Southern District of California, Charles W. Grimm, plaintiff, vs. California Spray-Chemical Corporation, defendant, No. 1798-ND Civil. Verdict.

"We, the jury impaneled to try the above entitled cause, find in favor of the plaintiff, Charles W. Grimm, and against the defendant, California Spray-Chemical Corporation, a corporation, and fix plaintiff's damages in the sum of \$....." Date and line for the foreman.

The other form of verdict carries, of course, the same title and cause, and says:

"We, the jury impaneled to try the above entitled cause, find in favor of the defendant, California Spray-Chemical Corporation, a corporation, and against the plaintiff, Charles W. Grimm." Also dated April blank, 1958 and the place for the signature of your foreman or forewoman.

So accordingly as you find and determine in the matter, under the law and the evidence, you will select the form of [464] verdict upon which you unanimously agree, and you will take these two forms of verdict to the jury room with you. When you have reached a unanimous agreement as to your verdict, you will have your foreman or forewoman fill in the date, fill in the blank spaces on the verdict, and then return to the court room with your verdict.

Now, if it becomes necessary during your deliber-

ations to communicate with the Court, you may notify Mr. Scott, the bailiff, but remember that you must not reveal to the Court or the bailiff or to any other person how the jury stands, until you have reached a unanimous verdict.

The Court will inquire of counsel whether there are objections to any of the instructions?

Mr. Barnard: None, your Honor.

Mr. Hamilton: No objection, your Honor.

The Court: We will swear the bailiff.

(H. R. Scott was duly sworn as bailiff)

The Court: Now, I think probably it would be more convenient to permit the jury to deliberate here in the courtroom and you can use not only the court room here but the jury room upstairs. When we leave, counsel must remove with them all of their briefcases and all materials that have not been received in evidence. The Clerk of the court will leave available to you on the table all exhibits which have been received in evidence, including the one on the [465] board over there.

Mrs. Wailes and gentlemen, all of the exhibits which have been received in evidence are the ones on the counsel table and the one on the board.

Everyone else will withdraw from the court room now, and the jury may commence their deliberations.

(Thereupon, at 2:30 p.m., the jury commenced their deliberations)

(The jury returned at 5:26 p.m.)

The Court: Do counsel stipulate the presence of the jury?

Mr. Barnard: Yes, your Honor.

Mr. Hamilton: So stipulated, your Honor.

The Court: Ladies and gentlemen, we have arranged for dinner for the members of the jury over at the Elks Club; they have a private dining room and it is the most convenient place for that purpose. So I am going to send you to dinner now, and in view of the fact Mrs. Wailes is on the jury I am going to have a matron sworn in as additional bailiff, so would you please come forward and be sworn, Mrs. Laird.

(Mrs. Laird was sworn as matron)

The Court: Then the members of the jury will be taken to dinner, in charge of the bailiff Mr. Scott and the matron, and following dinner you will return here and further deliberate. [466]

(After dinner, the jury returned at 7:05 p.m.)

(Stipulated jury present.)

The Court: Mrs. Wailes and gentlemen, have you arrived at a verdict? Who is the foreman? Mr. Peden. Has the jury arrived at a verdict?

Foreman Peden: No, we have not. We have asked for additional information.

The Court: What information?

Foreman Peden: We would like to have the testimony of Dr. Wilson, Mr. Hanna and Mr. Browne read.

The Reporter: I didn't know they wanted the testimony of Mr. Browne. It will take a little time to look that up.

The Court: We might read the testimony of the other two. Miss Schulke, if you will, make an effort so all members of the jury might hear you.

(The testimony of Dr. E. E. Wilson and J. L. Timothy Hanna was read by the reporter.)

The Court: I am going to ask the jury, in view of the testimony read by Miss Schulke, when Mr. Hanna was recalled to the stand, that related to Mr. Fisher, does the jury care to have Mr. Fisher's testimony read, or not?

Foreman Peden: Your Honor, I don't think it will be necessary.

The Court: It may take a while for the reporter to locate the other testimony in her notes. I think, except for the jury, we will all withdraw temporarily from the [467] court room and Miss Schulke will check her books, and just as soon as she has found Mr. Browne's testimony we will come back in here.

(The jury thereupon resumed deliberations, and returned to court at 9:05 p.m.)

(Stipulated the jury was present.)

The Court: Mr. Peden, has the jury arrived at a verdict?

Foreman Peden: We have not. I am sorry to have held the court reporter up. There was a slight misunderstanding.

(The testimony of Ashley Browne was read by the court reporter.)

The Court: Mr. Peden, is there any other testimony the jury wishes to have read back?

Foreman Peden: I think that is all.

The Court: Everybody except the jury will now leave and the jury will resume their deliberations.

(The jury resumed their deliberations, and returned into court at 10:00 p.m.)

(Stipulated jury was present.)

The Court: Mrs. Wailes and gentlemen of the jury, you have had a long day, some of you drive some distance. There are two courses open to us: I can let you separate and go home, and you can resume your deliberations, say, returning at 9:30 or 10:00 tomorrow morning; or if you desire you can continue your deliberations tonight. I would like to [468] find out which you prefer. If you care to discuss that matter privately, we will all withdraw from the court room and you can let the bailiff know what you prefer to do. As I say, I will permit you to separate and go home, to return tomorrow for further deliberation, if that is your desire, or you may desire to continue your deliberations tonight. Do you prefer to discuss that privately among yourselves?

Foreman Peden: I think we should discuss it among ourselves.

The Court: We will all withdraw, and you notify Mr. Scott.

(The jury resumed deliberations, and returned to court at 10:07 p.m.)

(Stipulated jury was present.)

The Court: Mr. Peden?

Foreman Peden: Your Honor, I think we would like to return in the morning and resume deliberations.

The Court: Very well. Well, the Court is going to permit you to do that. I might state it is not a common practice to permit a jury to separate after they have started deliberations, but I feel it is proper in this case. I do want to caution you that you must not talk about the case when you get home to any members of your family. I want you to bear that in mind, do not talk about the testimony or the facts, or your opinion, with your husband or your wife. [469] I realize you have to tell them where you have been and you have to tell them in the morning where you are going. But I do want to admonish you not to talk about the case to your friends or family, and of course do not permit them to ask you questions about the case, or the evidence, or what the facts are, or how the other members of the jury feel about it.

This is an extremely important admonition I am giving you, and one I know you will scrupulously observe. And of course do not express any opinions as to how you feel about the case to anyone.

Do counsel have any objections to the Court permitting the jurors to separate and return home?

Mr. Barnard: No, your Honor, no objection.

Mr. Hamilton: No objection, your Honor.

The Court: The jury then will be excused to separate and go to their homes, and I think I will ask you to return tomorrow morning at 10:00. I have a jury coming in at 9:30, and I don't think that matter is going to last very long. So I will now excuse the jury until tomorrow morning at 10:00 o'clock, and the Court will now adjourn.

(Thereupon, at 10:09 p.m., an adjournment was taken until 10:00 a.m., April 16, 1958.)

Wednesday, April 16, 1958, 10:00 a.m.

(The jury resumed deliberations, and returned into court at 11:51 a.m.)

(Stipulated jury was present.)

The Court: We have arranged for lunch for you at the Elks Club in the private dining room, so you will accompany the bailiff and matron, and return after lunch and resume your deliberations. Bear in mind the general admonition; do not talk about the case while over there or permit any other person to talk to you about the case.

(Thereupon, the jury went for lunch, and returned to resume deliberations; and returned to court at 3:13 p.m.)

(Stipulated the jury was present.)

The Court: Mr. Peden, has the jury arrived at a verdict?

Foreman Peden: Your Honor, the jury is unable to reach a verdict at the present time. We do not seem able to agree. It seems very improbable we will agree.

The Court: Well, the verdict reached by a jury of course should be the verdict of each juror and all members of the jury of course should individually arrive at a common verdict, if it can be done without doing violence to your individual judgment. I want the jurors, of course, to have ample opportunity to explore the evidence and ample opportunity for full and complete discussion, and if the

jurors can [471] reasonably do so, as I indicated without violence to your independent judgment, reach a verdict, why, of course, it serves, in my opinion, the administration of justice.

When a jury is unable to arrive at a verdict it means, of course, that the case has to be retried, and it means that some other jury would possibly have the same problems that this jury has.

So I would say to you that if you feel that some further deliberation might be fruitful, then I would suggest that you endeavor, if you reasonably can, to reach a verdict.

On the other hand, of course, you have deliberated since yesterday afternoon and if it is the view of the jurors that further discussion would not be fruitful, then of course there is not much point in requiring that you continue to deliberate.

Now, I don't want by any word or action of mine to convey the idea that I am trying to force, or use any pressure on any members of the jury, for the purpose of reaching a verdict. But if you can, as I say, reasonably do so under the law and the evidence, then I think the interests of all concerned would be served by you being able to agree.

Now, Mr. Peden, as foreman of the jury, has expressed his opinion that it appears unlikely to him—if I misquote you, Mr. Peden, let me know—it appears unlikely the members will be able to arrive at a unanimous verdict, and of course the verdict must be unanimous. [472]

I don't want any juror to indicate to me how he stands, numerically or any other way, but does any

other juror care to express a view, either in support of Mr. Peden's opinion, or to the contrary, or somewhere in between?

How do you feel, Mr. Tielman?

Mr. Tielman: Your Honor, we have deliberated pro and con for quite a number of hours, and it has got to the point where we apparently cannot agree on a verdict.

The Court: I see. You feel you have reached a deadlock. Mr. Porteous, how do you feel?

Mr. Porteous: Your Honor, I feel the same way.

The Court: Does any other juror have any contrary view?

Well, I am going to suggest this: suppose that you deliberate another half hour, we will say, and if you are still of the same view that you are deadlocked and hopelessly divided, then I think probably I will discharge you.

Juror No. 6: Your Honor, might I say a word. We are right where we were last night.

The Court: In other words, you haven't made much progress.

Juror No. 6: We haven't made any progress today, not since I left last night at ten o'clock.

The Court: Mr. Hallowell, you have heard the statements of the jurors. Do you have any view to suggest to the Court?

Mr. Hallowell: I would only say this, your Honor, of [473] course both sides want a verdict but no pressure or compulsion. Perhaps what the Court has said, if the jurors had time amongst themselves to talk it over, within 15 minutes they

may have determined that this—we should know whether we should go on further. Your Honor suggested half an hour. I think perhaps with what has been said they should have an opportunity to at least discuss it among themselves.

The Court: How do you feel, Mr. Brown?

Mr. Brown: I think perhaps Mr. Hallowell's suggestion is a good one. After the jury has had a discussion, they should reach a decision in less than half an hour.

The Court: Suppose you deliberate another 15 minutes, or so. As I say, I don't want you to feel in any way any pressure or influence of any kind being exerted by me on any member of the jury. As stated before, a verdict must be unanimous but it must represent the considered conscience of each juror.

All right, we will take a recess.

(The jury resumed deliberations, and returned to court at 4:04 p.m.)

(Stipulated jury was present.)

The Court: Mr. Peden, have you arrived at a verdict?

Foreman Peden: We have, your Honor.

The Court: Is the verdict the verdict of each member of the jury? [474]

Foreman Peden: Yes.

The Court: It is unanimous?

Foreman Peden: Yes.

The Court: Has the form of verdict been completed in accordance with my direction?

Foreman Peden: Yes.

The Court: It has been completed and dated and signed by you as foreman?

Foreman Peden: Yes.

The Court: I will ask the Clerk to read and record the verdict.

The Clerk: Charles W. Grimm, plaintiff, vs. California Spray-Chemical Corporation, a corporation, defendant. Verdict: "We, the jury impaneled to try the above entitled cause, find in favor of the plaintiff, Charles W. Grimm, and against the defendant, California Spray-Chemical Corporation, a corporation, and fix plaintiff's damages in the sum of \$4,750. April 16, 1958, J. S. Peden, Foreman."

Is that your verdict, members of the jury?

Jurors: Yes. Yes.

The Court: Let's poll the jury.

(The Clerk thereupon polled the jury, each juror answering in the affirmative to the question "the verdict, as presented and read, was that your verdict?")

The Court: I am going to discharge the jury at this time. [475] The Court in discharging the members of the jury wishes to express its appreciation of the willingness of the members of the jury to perform this very important service that is necessary in the administration of justice.

(Jury retires at 4:07.)

The Court: Let the record show the members of the jury have departed from the courtroom. The Court will direct counsel for the plaintiff to prepare

a judgment based upon the verdict, and to submit of course to counsel for defendant for his approval as to form, or non-approval as to form.

Are there any other matters either counsel care to bring before the Court?

Mr. Barnard: If the Court please, would the Court be willing to make an order of ten-day stay of execution after the judgment?

The Court: Yes, the Court will provide the execution be stayed for a period of ten days after entry of judgment.

Have you any motions, Mr. Hamilton?

Mr. Hamilton: Not at this present time, your Honor.

The Court: Well, the Court wishes to express its appreciation to counsel for their cooperation during the trial of this action. If there is nothing further, the Court will adjourn, to reconvene tomorrow morning on other matters. [476]

[Endorsed]: Filed July 9, 1958.

[Endorsed]: No. 16091. United States Court of Appeals for the Ninth Circuit. Charles W. Grimm, Appellant, vs. California Spray-Chemical Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Northern Division.

Filed: July 12, 1958.

Docketed: July 16, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16091

CHARLES W. GRIMM, Appellant,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION, a corporation, Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY, AND DESIGNATION OF RECORD DEEMED MATERIAL THERETO BY APPELLANT

Designation of Points on Appeal

The points on which Appellant, Charles W. Grimm, intends to rely in the above-entitled Court

on this appeal from the trial court's denial of his motion for a new trial, limited solely and exclusively to the issue of the nature and amount of damages, are as follows:

1. That the trial court acted in excess of its jurisdiction by issuing an order vacating the verdict of the jury in its entirety and granting a new trial on all issues that had been submitted to the jury (proximate cause and damages), more than ten days after entry of judgment, more than ten days after the date on which motions for a new trial could be filed, and at a time when the only motions before it were defendant's (appellee here) for a new trial on all issues, which the trial court expressly denied, and plaintiff's (appellant here) for a new trial limited exclusively to the issue of the nature and amount of damages.

2. That the trial court abused its discretion by issuing an order vacating the verdict of the jury in its entirety and granting a new trial on the issues of proximate cause and damages, the two issues submitted to the jury, more than ten days after entry of judgment and after the time for filing motions for a new trial had passed, when neither party had moved the court for a new trial limited to those two issues.

3. That the trial court abused its discretion by issuing its order vacating the verdict of the jury in its entirety and granting a new trial on the issues of proximate cause and the nature and extent of damages, more than ten days after entry of the

judgment, under circumstances where the trial court had denied defendant's (appellee here) motion for a new trial on all issues, where the jury's verdict in favor of plaintiff (appellant here) on proximate cause was fully supported by the evidence, where the amount of damages awarded was grossly inadequate and less than the undisputed amount, and where plaintiff had moved the trial court for a new trial, limited solely to the issue of nature and extent of damages.

Designation of Record to be Printed
By Appellant

Title of Document	Record page Clerk's transcript
Judgment	2
Clerk's Notice of Entry of Judgment.....	4
Plaintiff's notice of intention to move for new trial on Issue of Damages, together with Points and Authorities in support of Motion for New Trial and Specification of Particulars in reference to the Evidence.....	5
Motion for New Trial by Defendant.....	23
Affidavit of Alwyn C. Sessions in support of Defendant's Motion for New Trial.....	25
Defendant's Memorandum in Opposition to Plaintiff's Motion for New Trial on Issue of Damages alone	30
Affidavit of James S. Peden, Jury Foreman....	36

Affidavits in Opposition to Affidavit of Alwyn C. Sessions	38
Trial Court's Memorandum and Order on Mo- tions for New Trial, etc.....	45
Notice of Intention to Appeal and of Appeal...	49
Designation of Record on Appeal and Statement of Points	54

Dated: July 21, 1958.

CONRON, HEARD & JAMES and
WAYNE M. HAMILTON,
/s/ By WAYNE M. HAMILTON
Attorneys for Appellant
Charles W. Grimm.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 22, 1958. Paul P.
O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

DESIGNATION OF ADDITIONAL PARTS OF
RECORD DEEMED MATERIAL BY AP-
PELLEE

In addition to the portions of the record heretofore designated to be printed by the appellant, appellee further requests that the five (5) volumes of reporter's official transcript of proceedings designated as Item B on the certificate by John A. Childress, Clerk of the United States District Court, dated July 14, 1958, be printed as a part of the record on the above entitled appeal.

Dated: July 28, 1958.

WILD, CHRISTENSEN,
BARNARD & WILD,
/s/ ROBERT M. BARNARD,
Attorneys for Appellee, California Spray-Chemical
Corporation, a corporation.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed July 29, 1958. Paul P.
O'Brien, Clerk.

No. 16,091

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES W. GRIMM,

Appellant,

vs.

CALIFORNIA SPRAY-CHEMICAL CORPORATION,
TION,

Appellee.

On Appeal from the United States District Court
for the Southern District of California,
Northern Division.

Honorable Gilbert H. Jertberg, Judge.

OPENING BRIEF FOR CHARLES W. GRIMM, APPELLANT.

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FILE

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PAUL P. O'BRIEN, CL

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No. 16,091

IN THE
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CHARLES W. GRIMM,

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VS.

CALIFORNIA SPRAY-CHEMICAL CORPORATION,
TION,

Appellee.

On Appeal from the United States District Court
for the Southern District of California,
Northern Division.

Honorable Gilbert H. Jertberg, Judge.

OPENING BRIEF FOR CHARLES W. GRIMM, APPELLANT.

Comes now Charles W. Grimm, Appellant, and respectfully submits his Opening Brief on appeal wherein he appeals solely and exclusively from those portions of that certain "memorandum and order on motions for a new trial" made by the United States District Court, Southern District of California, Northern Division, wherein and whereby said Court ordered that the verdict of the jury, insofar as it found the Appellee liable for the damages suffered by Appellant, be vacated and set aside, and wherein and

whereby said Court ordered a new trial on the issue of causation.

PLEADINGS AND FACTS DISCLOSING JURISDICTION.

A. Jurisdiction of District Court.

This is a civil action originally filed by Charles W. Grimm as plaintiff in the Superior Court of the State of California, in and for the County of Kern, under Clerk's File No. 70422, alleging breach of both an express and an implied warranty of fitness for use of certain agricultural chemicals purchased directly from, and used in accord with, the directions of Appellee, defendant there, and subsequent damage in excess of \$3,000.00 to a peach orchard owned by Appellant and situated in the County of Kern, State of California, with the contract of purchase and sale and of warranty having been made and performed in said Kern County (R. 6-12).

Appellee, upon service of Complaint and Summons, forthwith petitioned the United States District Court, Southern District of California, Northern Division, for its order removing the action from the said State Court to the said United States Court on the basis of diversity of citizenship. The petition for the removal alleged generally the filing of the action in the State Court, that sole plaintiff, Charles W. Grimm, was a resident and citizen of the State of California, that sole defendant, California Spray-Chemical Corporation, was a corporation, organized and existing under the laws of the State of Delaware and was a resident and citizen of the State of Delaware, and that the

amount in controversy exceeded the sum of \$3,000.00 (R. 3-5). A good and sufficient bond on removal, securing costs, was filed with said petition.

The facts alleged in the petition for removal being true, Appellant did not oppose the petition.

The jurisdiction of the United States District Court rests on 28 U.S.C.A. 1332 (Diversity of Citizenship and Amount in Controversy). Venue in the Southern District of California, Northern Division, rests upon 28 U.S.C.A. 1391 (a) and (c) (Venue generally). The right of removal from the State Court to the Federal Court rests upon 28 U.S.C.A. 1441 (a) (Actions Removable Generally).

B. Jurisdiction of the Court of Appeals.

1. Jurisdiction under Section 1291 of Title 28, U.S.C.A., on the basis that the Order is a denial of a Motion for New Trial.

The jurisdiction of the United States Court of Appeals, for the Ninth Circuit, to hear and determine this "Appeal" is difficult and close, and indeed may be the most important issue to be here determined. Therefore, a rather complete review of events, documents filed and proceedings had through the order appealed from is deemed essential here.

The cause was heard by a jury and verdict and judgment thereon entered in favor of Appellant (R. 16-17). Judgment was entered on April 25, 1958 (R. 18). Believing himself aggrieved by the inadequacy of the amount of damages awarded, on May 3, 1958, Appellant filed a motion for a new trial limited solely to the issue of the extent and nature of dam-

ages, with supporting points and authorities (R. 18-37). On May 5, 1958, Appellee filed a Motion for a New Trial on all issues, with supporting affidavit. The grounds urged in Appellant's motion were (1) inadequate damages awarded and (2) insufficiency of the evidence to justify that portion of the verdict fixing damages (R. 19). The grounds urged in Appellee's motion were (1) error in excluding evidence, (2) improper verdict arrived at by compromise resulting from coercion, (3) newly discovered evidence (R. 37-39).

On May 19, 1958, some twenty-four days after entry of the judgment, oral arguments on the motions of appellant and of appellee for a new trial were heard. Points and authorities in support of appellant's motion for a new trial on limited issues were before the Court (R. 20-37). Points and Authorities in opposition thereto were before the Court (R. 43-47). The Affidavit of James S. Peden, Foreman of the Jury that heard the cause, filed by Appellant, was before the Court (R. 48-49). The Affidavit of Alwyn C. Sessions in support of Appellee's motion for a new trial on all issues was before the Court (R. 38-42). The Affidavits of W. W. Wright (R. 50-51), of W. H. Hart (R. 52), of Roy Mitchell (R. 53-54), and of Joe Guimarra (R. 54-56), filed by Appellant in opposition to the Affidavit of Alwyn C. Sessions were before the Court.

On May 22, 1958, some twenty-seven days after the date of entry of judgment, the Court issued and filed its "Memorandum and Order on Motions for a New Trial and Order Fixing Date for Resetting for Trial" (R. 57-61).

In its said Memorandum and Order, the Court reviews the facts of the verdict and judgment, the filing of the motions for a new trial, states the issues submitted to the jury, to-wit, causation and extent and nature of damages, recites that the jury deliberated some fourteen hours and once, late in its deliberations, announced that it was unable to reach a verdict, declares that the damages awarded were unquestionably inadequate, gives the opinion that the issue of causation was a difficult and close one, concludes that a new trial should be granted only on the two issues submitted to the jury and orders:

(1) That the verdict of the jury be vacated and set aside in its entirety.

(2) That a new trial be granted on the two issues submitted to the jury (causation or liability and nature and extent of damages).

(3) Denies defendant's, Appellee here, Motion for a New Trial.

This appeal is taken from portions of the Orders numbered (1) and (2) above, to-wit, vacating the jury's finding on liability and ordering a new trial on liability.

Cases holding that an order granting a motion for a new trial is not an appealable order are legion. Some cases so holding are *Hayes v. United States*, 172 Fed. 2d 677, 679-680 (9th Cir. 1949); *Libby, McNeill & Libby v. Malmskold*, 115 Fed. 2d 786, 787 (9th Cir. 1941); *Frank Mercantile Corp. v. Prudential Insurance Co.*, 115 Fed. 2d 496, 497 (3rd Cir. 1940); *Tsoleas*

v. Hege, 250 Fed. 2d 127 (4th Cir. 1957); *Ford Motor Co. v. Busam Motor Sales*, 185 Fed. 2d 531, 533, 536 (6th Cir. 1950).

Section 1291 of Title 28, U.S.C.A., insofar as it is material here, states that "the Courts of Appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ."

Under this statute, an order granting a new trial is held to be a non-appealable order for the reason that it is not a *final* decision, but is interlocutory. However, an order denying a motion for a new trial is held to be a final decision and is thus an appealable order, if there has been an abuse of discretion. Appeals from orders denying a motion for a new trial are regularly heard as part of an appeal from the original judgment. *Flinkkote Company v. Lysfjord*, 246 Fed. 2d 368, 389 (9th Cir. 1957), Cert. Denied, 355 U.S. 835; *John E. Smith's Sons Co. v. Lattimer Foundry & Mach. Co.*, 239 Fed. 2d 815, 816 (3rd Cir. 1956); *Uhl v. Echols Transfer Co.*, 238 Fed. 2d 760, 761 (5th Cir. 1956); *Whitman v. Pitrie*, 220 Fed. 2d 914, 918 (5th Cir. 1955); *Peterman v. Indian Motorcycle Co.*, 216 Fed. 2d 289, 291 (1st Cir. 1954).

The order as made is in substance and in fact a denial of appellant's motion for a new trial, limited to the issue of the extent and nature of his damages. Appellant moved the trial court for its order vacating and setting aside that portion of the jury's verdict and the judgment based thereon fixing and awarding him damages in the amount of \$4,750.00 on the basis that the amount awarded was inadequate, and not supported by the evidence (R. 19).

The Appellee agrees that the sum awarded as damages was inadequate. In its Memorandum in Opposition to Plaintiff's Motion for New Trial, it states "but defendant does agree with the plaintiff that if the question of liability was to be eliminated, the damages sustained by plaintiff far exceed the sum awarded" (R. 44). The court agrees with appellant that the sum awarded as damages was inadequate. In its Memorandum and Order on Motion for a New Trial, the Court states:

"I have reviewed the record in this case, and I am satisfied that the undisputed evidence established that the plaintiff suffered minimum damages in the sum of \$9,919.00, which figure resolves all doubt as to the extent of damages against the plaintiff. Therefore, I am satisfied that the verdict of \$4,750.00 was inadequate under the evidence in this case . . ." (R. 59).

The trial court specifically denies appellee's motion for a new trial. The Court does not specifically grant or deny appellant's motion for a new trial, but, proceeding on its own initiative, on grounds not urged or mentioned in either motion, vacates the verdict in its entirety and orders a new trial on the two issues of proximate cause and damages (R. 57-61). Appellant contends that this is in substance and in fact a denial of his motion for a new trial and further contends that the court abused its discretion by forcing upon him a new trial, which he did not request and which is beyond the scope of his motion. This contention of abuse of discretion will be developed in detail later in this brief.

If appellant is on sound ground in contending that the trial court's order amounts to a denial of his motion for a new trial, then Section 1291 of Title 28 U.S.C.A. constitutes statutory authority under which this Court of Appeals has jurisdiction to hear and determine this appeal. In *Flintkote Company v. Lysfjord*, 246 Fed. 2d 368, 389 (9th Cir. 1957), in connection with an appeal from an order denying a motion for a new trial made upon the grounds that the verdict on damages was excessive, this Court of Appeals stated:

“At the outset appellees question this court's power to review the denial of a new trial on the grounds of excessive damages. Regardless of what the rule may be in other circuits, this court has repeatedly affirmed its authority to review such a denial. (Citing cases.) And it may reverse the lower court's decision if it finds the verdict grossly excessive or monstrous. *So. Pac. Co. v. Guthrie*, 9 Cir., 186 F. 2d 295. Stated differently, however, appellant's contentions in the instant case actually challenge the sufficiency of the evidence to support the jury verdict, a question of law, and one which this court or any appellate court of ordinary jurisdiction has undoubted power to decide.”

It is recognized that in the ordinary situation, which was true in the *Flintkote Co.* case, when a motion for a new trial is denied, the verdict or judgment is affirmed and the appeal from the denial of the motion is heard as a part of an appeal from that judgment on the basis of insufficiency of the evidence. In the case at bar, both parties moved for a new trial.

Appellee's motion was specifically denied. Appellant is in the anomalous position of arguing that his motion for a new trial was denied but having no judgment or verdict from which to appeal for the reason that the Court, in excess of its jurisdiction, issued an Order vacating the verdict in its entirety. However, this is not believed to bar this appeal under the rule of *Phillips v. Negley*, 117 U.S. 665, 6 S. Ct. 901, 29 L. Ed. 1013 (1886); *Untersinger v. United States*, 181 Fed. 2d 953 (2nd Cir. 1950); and *Jackson v. Wilson Trucking Corp.*, 243 Fed. 2d 212 (D.C. Cir. 1957), to the effect that an order made without jurisdiction on the part of the Court making it is a proceeding which must be the subject of review by an Appellate Court.

2. Jurisdiction under Section 1292 of Title 28, U.S.C.A.

On September 2, 1958, Section 1292 of Title 28, U.S.C.A., was amended (Public Law 85-919; 72 Stat. 1770). The amendment adds a new subparagraph to this section, reading as follows:

“(b) When a District Judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order; Provided, however, that application

for an appeal shall not stay proceedings in the District Court unless the District Judge or the Court of Appeals or a Judge thereof shall so order." Approved September 2, 1958.

A statute is presumed to speak from the time of its enactment and embraces all such persons or things as subsequently fall within its scope. *M/V Monsuco, Inc. v. Comm. Int. Rev.*, 234 Fed. 2d 583, 588 (4th Cir. 1956); *Strategical Demolition Torpedo Co. v. United States*, 110 Fed. Supp. 264, 265, 124 Ct. Cl. 492 (1953).

Changes in procedural or remedial law are generally to be regarded as immediately applicable to existing causes of action and not merely to those which may accrue in the future, unless a contrary intent is expressed in the statute. *Dargel v. Henderson*, 200 Fed. 2d 564, 566 (Emergency Ct. of App. 1952).

The line between substantive and procedural law is sometimes hazy, but in keeping with the spirit of Federal Civil Procedure, any uncertainty should be resolved in favor of applying new law to pending litigation. The aim of Congress in revising the judicial code, being procedural, the new provisions are applicable to pending proceedings unless the contrary appears in the statute. *Hadlich v. American Mail Line*, 82 Fed. Supp. 562, 563-564 (N.D. Cal. 1949).

A suit in the process of appeal is a "pending suit" within the rule that an amendment relating only to procedural machinery provided to enforce substantive rights applies to pending as well as future suits. *Bowles v. Strickland*, 151 Fed. 2d 419 (5th Cir. 1945).

The above-quoted amendment to Sec. 1292 of Title 28, U.S.C.A., did not replace or modify any existing statute or portion of a statute. Therefore, being wholly new, it may well be that the order herein appealed from is not drawn in a manner that will bring this appeal within the shelter of the new statute.

This is a civil action, and the order is not otherwise appealable under said Section 1292. Was the District Judge of the opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion? In its memorandum and order, the Court states:

“In order to accomplish this duty (see that both parties receive a fair trial), I feel that a new trial must be granted on two issues which were submitted to the jury. *I feel that I have power to do so*, even though the plaintiff has restricted his motion for a new trial only on the issue of damages.” (Emphasis ours.)

There is doubt in the mind of the Court. This doubt arises from the following rules:

1. A motion for a new trial is addressed to the sound discretion of the Court. *Complete Auto Transit v. Floyd*, 249 Fed. 2d 396, 399 (5th Cir. 1957).

2. Rule 59 (d) of Federal Rules of Civil Procedure, Title 28, U.S.C.A., provides that, not later than ten days after entry of judgment, the Court on its own initiative may order a new trial on any meritorious grounds.

3. The rule that after ten days subsequent to the entry of judgment the court is limited in the order it

can make to the scope of the motions timely filed and then before it. *Patton v. Baltimore & Ohio R. Co.*, 120 Fed. Supp. 659, 214 Fed. 2d 129 (3rd Cir. 1954); *Kanaster v. Chrysler Corp.*, 199 Fed. 2d 610, 615 (10th Cir. 1952).

Is this indication of uncertainty sufficient to show that it was the judge's opinion that there was substantial grounds for a difference of opinion on his power to make the order for a new trial, include issues not within the scope of the motion before him, more than ten days after the entry of judgment? Appellant contends that it is.

The final provision of Section 1292 (b) which appellant must fulfill or avoid is to the effect that the district judge shall state in writing in his order that an immediate appeal from the order may materially advance the ultimate termination of the litigation. There being no such statutory provision when the memorandum and order were drafted, there is of course no such statement in the order. Is appellant's appeal to be barred by this technicality?

If, as appellant contends, the court was acting in excess of its jurisdiction by ordering a new trial on both the issue of proximate cause and the issue of nature and extent of damages, at a time more than ten days after the entry of judgment, and when it had no such motion before it, or acted in abuse of its discretion by forcing upon appellant a new trial that appellant did not desire and did not request, more than ten days after entry of judgment, then the order

ought to be and, either now or later, will be reversed. If upon reconsideration, either here or at some later date, the District Court is reversed with directions, and it is then determined that the interests of justice require that appellant's motion be denied, the litigation is at an end. If upon reconsideration the interests of justice require that the motion be granted, then the time of trial will be reduced by three to four days and costs to the litigants and to the government will be reduced by at least two-thirds.

Should a new trial as ordered be had and a verdict in favor of appellant be entered and damages be awarded commensurate with his losses, then, most surely, appellee here will appeal on the basis that the order of a new trial was in excess of the court's jurisdiction. If upon a further trial a verdict against appellant is entered, then he, most surely, will appeal on the basis that the court's order for a new trial was in excess of its jurisdiction and an abuse of discretion. In other words, this Court of Appeals must eventually determine the issues here presented. To dismiss this appeal on the basis of a technical flaw in the order, which would have been corrected had the court or counsel the prescience to foretell the contents of this new subparagraph (b) now added to said Section 1292, will do nothing but promote expensive, time-consuming but useless litigation.

Rule 1 of Title 28, U.S.C.A., provides in part that "They (these rules) shall be construed to secure the just, speedy, and inexpensive determination of every action."

The purpose of these rules was to eliminate complaints as to technicalities of the law, the subtleties of practice and the involvements of procedure. *United Press Ass'ns v. Charles*, 245 Fed. 2d 21, 26 (9th Cir. 1957).

In *Magnetic Engineering & Manufacturing Co. v. Dings Manufacturing Co.*, 178 Fed. 2d 866, 870 (2nd Cir. 1950), considering an appeal from an interlocutory order made pursuant to a motion for a change of venue, the court finds that, notwithstanding the absence of technical jurisdiction, the merits of the appellant's position might be so plain that we ought not to hesitate to intervene, even though the order for transfer could be reviewed on appeal from the judgment eventually entered. (This paraphrase of the *Magnetic Etc.* rule appears in *Foster-Milburn Co. v. Knight*, 181 Fed. 2d 949, 951 (2nd Cir. 1950).)

In *Milton v. United States*, 120 Fed. 2d 794, 796 (5th Cir. 1941), in considering an appeal from the denial of a motion for a new trial the court states:

“That appellant has mistakenly appealed from the order overruling the motion for a new trial . . . may be considered purely a technicality. In the interests of justice and to avoid prolonging litigation for no good purpose, without intending to create a precedent, we consider that we may disregard the motion to dismiss the appeal and decide the case on its merits.

“The rules of civil procedure were adopted to abolish technicalities and to expedite the due administration of justice.”

In *Creedon v. Loring*, 249 Fed. 2d 714, 716-717 (1st Cir. 1957), the court states generally as follows: Where the District Court denied a timely motion for a new trial and appellant's appeal was timely filed but was from the order denying his motion for a new trial and not from the judgment, appellee's motion to dismiss the appeal on the ground of lack of jurisdiction because the appeal was not taken from the final judgment would be denied because appellee's motion was founded not on merit but a pure technicality.

The legislation which resulted in the amendment to said section 1292 was introduced at the request of the Administrative office of the United States Courts pursuant to the direction of the Judicial Conference of the United States. In the legislative history three examples of situations which the amendment is designed to prevent are given. These examples show a motion, an interlocutory order, subsequent trial, entry of judgment, appeal from the interlocutory order in connection with an appeal from the final judgment and a reversal of the interlocutory order, which caused the trial to have been a useless gesture accomplishing nothing, and wasting the time of the District Court, witnesses and litigants, and considerable expenses on the part of the litigants. The situations given in the examples are squarely in point with the circumstances presented here. See, *U.S. Code Congressional and Administrative News*, 1958, pp. 7263-7266, West Publishing Co., advance pamphlet, No. 18, dated October 20, 1958.

Except for objections based on technical grounds, to wit, the absence of a more explicit declaration by the District Court that its order for a new trial involves a controlling question of law on which there is substantial grounds for a difference of opinion and any declaration that an immediate appeal from the order would materially advance the ultimate termination of the litigation, it is believed that this Court of Appeals has jurisdiction to hear and determine this appeal under Section 1292, as amended, of Title 28, U.S.C.A.

3. Jurisdiction under Certiorari.

Appellant contends that the trial court acted in excess of its jurisdiction in vacating the judgment in its entirety and granting a new trial on the issue of causation as well as the issue of damages.

There are numerous cases holding that questions concerning the jurisdiction of the District Court to make a certain order are reviewable under the appellate court's general powers to issue extraordinary writs. Section 1651 of Title 28, U.S.C.A.

In *Greyerbiehl v. Hughes Electric Co.*, 294 Fed. 802, 804 (8th Cir. 1923), the court states, the question of the jurisdiction of the District Court to make an order vacating a verdict and judgment and granting a new trial is reviewable by the Circuit Court of Appeals on a writ of error, or, if through no fault of the appellant, an application for a writ of error was not filed within the required time the question of jurisdiction is reviewable by the Court of Appeals on a writ of certiorari.

In *Magnetic Eng. & Mfg. Co. v. Dings Mfg. Co.*, 178 Fed. 2d 866, 869 (2nd Cir. 1950), the Court holds that, inasmuch as the appellant had no other speedy and adequate remedy, and the Court had jurisdiction to issue the writ, if appellant had applied for it, where appellant attempted to appeal from a non-appealable order, the court of appeals was free to treat the appeal as a petition for mandamus.

In *In re Chetwood*, 165 U.S. 443, 17 S. Ct. 385, 41 L. Ed. 782 (1897), the United States Supreme Court stated:

“Whenever the circumstances imperatively demand that form of interposition, the writ (certiorari) may be allowed, as at common law to correct excesses of jurisdiction and in the furtherance of justice.”

If the lower court is clearly without jurisdiction the writ of certiorari will ordinarily be granted to one who at the outset objected to the jurisdiction, has preserved his rights by appropriate procedure and has no other remedy. *Hazeltine Corp. v. Kirkpatrick*, 165 Fed. 2d 683, 685 (3rd Cir. 1948).

Where the District Court has attempted to set aside or annul a judgment or decree and in doing so has acted wholly without jurisdiction or power in the premises, its act is void and mandamus will lie to correct the error. *In re Dernet*, 215 Fed. 673, 679 (9th Cir. 1914), citing *Phillips v. Negley*, 117 U.S. 665, 671-672, 6 S. Ct. 901, 903, 29 L. Ed. 1013 (1886), as holding that, if an order is made without jurisdiction on the part of the court making it, then it is a

proceeding which must be the subject of review by an appellate court.

An appeal lies from an interlocutory order of a judge, vacating a judgment and directing a new trial, if when he acts the time has passed within which he has the power to change the judgment. *Untersinger v. United States*, 181 Fed. 2d 953, 955 (2nd Cir. 1950), citing *Foster-Milburn Co. v. Knight*, 181 Fed. 2d 949, 951 (2nd Cir. 1950), as holding that, if a court re-opens a judgment after the time has passed within which it has the power to do so, an appeal lies, although the order grants a new trial and is therefore interlocutory. Accord, *Jackson v. Wilson Trucking Corp.*, 243 Fed. 2d 212, 214 (D.C. Cir. 1957), which held that:

“An order granting a new trial is not ordinarily reviewable. But where, as in the case at bar, such an order exceeds the power of the court, it may be reviewed notwithstanding the absence of a final judgment.”

That appellant may have mistakenly appealed from the interlocutory order and mistakenly denominated his papers as an appeal, when more properly he should have petitioned for a writ of certiorari, and so indicated in his notices and pleadings, need not be fatal to the relief requested.

In *Ivanhoe Irrigation District v. McCracken*, 78 S. Ct. 1174, 1183 (June 23, 1958), the United States Supreme Court, admitting that it had no jurisdiction over the appeals, determined to treat the papers as petitions for certiorari and granted certiorari.

In *Creedon v. Loring*, 249 Fed. 2d 714, 716-717 (1st Cir. 1957), plaintiff appealed from an order denying his motion for a new trial. Defendant moved to dismiss the appeal for lack of jurisdiction, contending that the order appealed from was not an appealable order and that the appeal should have been taken from the judgment. Held: The motion to dismiss would be denied because it was founded on a pure technicality.

In *Amsler Morton Corp. v. Union of Soviet Socialist Republics*, 226 Fed. 2d 289 (4th Cir. 1955), the Court of Appeals recognizes that a petition for certiorari is an appropriate procedure for the review of a District Court's interlocutory order.

In *Milton v. United States*, 120 Fed. 2d 794, 796 (5th Cir. 1941), an appeal from an order denying a motion for a new trial, the Appellate Court states:

"That appellant has mistakenly appealed from the order overruling the motion for a new trial . . . may be considered purely a technicality. In the interests of justice and to avoid prolonging litigation for no good purpose, without intending to create a precedent, we consider that we may disregard the motion to dismiss the appeal and decide the case on its merits."

Untersinger v. United States, 181 Fed. 2d 953 (2nd Cir. 1950); *Foster-Milburn Co. v. Knight*, 181 Fed. 2d 949 (2nd Cir. 1950); *Turner v. United States*, 229 Fed. 2d 944 (6th Cir. 1956); *Fried v. McGrath*, 133 Fed. 2d 350 (D.C. Cir. 1942); *Jackson v. Wilson Trucking Corp.*, 243 Fed. 2d 212 (D.C. Cir. 1957);

Phillips v. Negley, 117 U.S. 665, 6 S. Ct. 901, 29 L. Ed. 1013 (1886); *Lebeck v. William A. Jarvis, Inc.*, 250 Fed. 2d 285 (3rd Cir. 1957) all involved appeals from an order granting a motion to vacate a verdict or judgment and for a new trial, as distinguished from the review of such an order by writ of error or certiorari. All cases held such an order to be reviewable on an appeal based on the ground of conduct by the District Court in excess of its jurisdiction. All resulted in a determination of the appeal on its merits.

Kanaster v. Chrysler Corporation, 199 Fed. 2d 610 (10th Cir. 1952); *In re Dernett*, 215 Fed. 673 (9th Cir. 1914); *Greyerbiehl v. Hughes Electric Co.*, 294 Fed. 802 (8th Cir. 1923); *In re Chetwood*, 165 U.S. 443, 17 S. Ct. 385, 41 L. Ed. 782 (1897); *Amsler Morton Corp. v. Union of Soviet Socialist Republics*, 226 Fed. 2d 289 (4th Cir. 1955); *Hazeltine Corp. v. Kirkpatrick*, 165 Fed. 2d 683 (3rd Cir. 1948), and *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 Fed. 2d 866 (2nd Cir. 1949) all make it abundantly clear that the granting of a motion to vacate a verdict or judgment and for a new trial or other manifestly interlocutory order of the District Court is subject to review under one of the extraordinary writs, to-wit, mandamus, error or certiorari, if sound grounds are shown to the effect that the trial court acted in excess of its jurisdiction in making the order. Such writs are available under Section 1651 of Title 28, U.S.C.A. Under certain circumstances an appeal improvidently taken may be regarded and acted upon as a petition for writ of certiorari. Section 2103 of Title 28, U.S.C.A.

4. Jurisdiction under Section 1291 of Title 28, U.S.C.A., on the basis that the order is a final decision on new matter arising after judgment.

John E. Smith's Sons Co. v. Lattimer Foundry & Machine Co., 239 Fed. 2d 815 (3rd Cir. 1956), involved an appeal from an order denying a motion for a new trial, but no appeal from the judgment, which the order left undisturbed. Appellee moved to dismiss the appeal on the basis that this was not an appealable order. The Appellate Court, at page 816, held:

“However, to the extent that the denial of the motion for a new trial involves new matters arising after entry of the judgment and which were accordingly not decided by the judgment, it may present appealable subject matter for consideration upon an appeal from the order denying the motion, as distinguished from an appeal from the original judgment.”

The Court cites *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 482, 485, 53 S. Ct. 252, 255, 77 L. Ed. 439 (1933), as holding that under certain circumstances the Appellate Court may inquire into the action of the trial court on a motion for a new trial. Examples given are where the trial court erroneously excluded from consideration matters which were appropriate to a decision on the motion; acted in the mistaken view that it had no jurisdiction to grant the motion; or that there was no authority to grant it on the grounds advanced.

All of the matters involved in this appeal are matters which occurred after the entry of the judgment, save and except the assessing of damages at \$4,750.00,

which all parties, including the Court, agree were grossly inadequate. These matters were not decided by the judgment, and will not be decided by any subsequent judgment. No good reason comes to mind why the rules, set forth in the two cases cited immediately above, should not be as applicable to orders granting a new trial as to orders denying a new trial, except, perhaps, that the former is a little further removed from a literal and technical application of the "final decision" phrase of 28 U.S.C.A., Section 1291.

This appeal involves an issue of law, to-wit, the jurisdiction of the trial court to make the order under *Rule 59 of Title 28, U.S.C.A.*, together with the contention that the Court abused its discretion in forcing upon the moving party a new trial of a scope which he neither requested nor desired. No issues of fact or discretion are involved.

Under any view of these proceedings, the order constitutes the final decision of the District Court on the issues here presented. It is true that Appellant can submit to the order, proceed with and bring a new trial to a conclusion, and then as part of an appeal from the judgment then entered bring these issues before this Court. It is this circuitous, time-wasting and expensive route which the amendment to Section 1292, of Title 28 U.S.C.A., was designed to avoid.

To sum up the factual situation and the matter of jurisdiction of the United States Court of Appeals for the Ninth Circuit, it is the contention of Appellant that this Court has jurisdiction under one or all of the following statutes and premises:

The jury brought a verdict in favor of plaintiff-Appellant and judgment based on the verdict was entered. Defendant-Appellee moved to vacate the judgment in its entirety and for a new trial on all issues on the basis of error in exclusion of evidence, compromise verdict resulting from coercion, and newly discovered evidence. Appellant moved to vacate that portion of the judgment fixing and allowing damages and for a new trial on the single issue of damages on the basis that the damages awarded were grossly inadequate and not supported by the evidence. Some twenty-seven days after entry of the judgment, the District Court made and entered its order denying defendant-Appellee's motion and then, with only plaintiff-Appellant's motion before it, ordered the judgment vacated in its entirety and a new trial on the issues of causation and damages.

1. Appellant contends that this was in substance and in fact a denial of his motion and an act of the Court, taken on its own initiative in excess of its jurisdiction and imbued with an abuse of discretion. If this contention is sound, we do have an order reviewable on appeal under the time honored rule of *Phillips v. Negley*, 117 U.S. 665, that an order made without jurisdiction on the part of the Court making it is a proceeding which must be the subject of review by an Appellate Court. *Jackson v. Wilson Trucking Corp.*, 243 Fed. 2d 212 (D.C. Cir. 1957); *Fried v. McGrath*, 133 Fed. 2d 350 (D.C. Cir. 1942); *Kanaster v. Chrysler Corporation*, 199 Fed. 2d 610 (10th Cir. 1952); *In re Dernet*, 215 Fed. 673 (9th Cir. 1914).

2. Appellant contends that Section 1292 of Title 28, U.S.C.A., as amended by the addition of subdivision (b), specifically provides that the order here under review is an appealable order. However, inasmuch as the amendment was not in existence when the order was drafted, certain technical language, which the amendment requires, was omitted. Under the liberal interpretation of the Federal Rules of Civil Procedure, always applied by the Federal Courts, appellant's appeal from the order may be deemed properly before this Appellate Court under said Section 1292 as amended. The line of reasoning here is to the effect that changes in procedure apply to causes already accrued and pending as well as those thereafter accruing; a cause on appeal is an action pending; changes in Federal rules of procedure are procedural changes; objections to bringing this order within the scope of the amendment are purely technical and do not go to the merits.

3. Appellant's notices, petitions and briefs, even denominated an appeal, may, under liberal construction, be regarded as an application for a writ of certiorari if certiorari is the proper legal proceeding for bringing these matters on for review by this Court.

4. The order as entered constitutes a final decision on questions of law, not involved in the judgment and which will not be determined in any subsequent judgment which may be entered herein. Therefore, the order is an appealable order under Section 1291 of Title 28, U.S.C.A., granting the Courts of Appeals jurisdiction over appeals from all "final decisions"

of the district courts except those subject to direct review by the Supreme Court.

STATEMENT OF THE CASE.

Appellant's action was originally filed in the Superior Court of the State of California, in and for the County of Kern. The Complaint alleged plaintiff to be the owner of a certain peach orchard located in Kern County; that plaintiff purchased certain agricultural chemicals from Appellee to be used as a mixture in a spray to be applied to his peach orchard; that he mixed, used and applied the chemicals at the time and in the manner and amount recommended by Appellee; that Appellee both expressly and by implication under California's version of the Uniform Sales Act warranted that if the chemicals were so mixed, used and applied, they were fit for their intended use and would not injure the peach trees; that the spray did injure his orchard (R. 6-10) and that his damages therefrom totaled \$22,537.86 (R. 58-59).

Appellee moved the United States District Court, Southern District of California, Northern Division, for its order transferring the cause to that Court on the basis of diversity of citizenship and matter in controversy within its monetary jurisdiction (R. 3-5). The motion was unopposed and was granted.

Appellee's Answer admitted the sale and the use of the chemicals as a spray on the peach orchard, but denied the warranty both express and implied, denied

that the chemicals were mixed, used and applied at the time and in the manner and amounts it had recommended, denied that the spray caused the damage to the orchard and denied that Appellant suffered any loss (R. 12-16).

Just prior to the opening of trial, defendant-Appellee stipulated to the making of the warranty and that the chemicals were mixed, used and applied according to its recommendations as to time, amount and manner. These issues were never submitted to the jury. Only two issues were submitted to the jury. These were: (1) Did the spray in fact cause any damage or injury to plaintiff's peach orchard? (2) If the spray did cause any damage to plaintiff's peach orchard, then what was the nature and extent of the damage so caused? (R. 58-59).

After trial lasting some six days, the jury returned a unanimous verdict in favor of Appellant on both issues, finding that the spray did damage the peach orchard but fixing the amount of the damage at \$4,750.00 (R. 16-17). Judgment based on the jury's verdict was entered on April 25, 1958, and notice thereof duly given (R. 17-18).

Appellant, deeming himself aggrieved by reason of the inadequacy of the amount of damages awarded, filed his notice of intention to move for a new trial limited to the issue of the nature and extent of damages, with points and authorities in support of his motion attached, on May 3, 1958 (R. 18-37). On May 5, 1958, defendant-Appellee filed its motion for a new trial on all issues, and an Affidavit in support of its

contention that it had discovered new evidence (R. 37-42). On May 9, 1958, Appellee filed its memorandum in opposition to Appellant's motion for a new trial on the issue of damages alone (R. 43-47).

It should be noticed that May 5th was the 10th day after the entry of judgment and the last day on which a motion for a new trial could have been filed, under Rule 59 (b) of Title 28, U.S.C.A., *Federal Rules of Civil Procedure*, and the last day on which the Court on its own initiative could have ordered a new trial, under Rule 59 (d) of *Federal Rules of Civil Procedure*.

On May 19, 1958, after receipt of additional affidavits, one in support of Appellant's motion, the affidavit of James S. Peden, Jury Foreman (R. 48-49), and four in opposition to Appellee's contention of newly discovered evidence (R. 49-56), the Court heard oral argument on their respective motions by counsel for both parties (R. 58). On May 22, 1958, the Court issued and entered its memorandum and order on motion for a new trial (R. 57-61).

In its memorandum, the Court, after reviewing the verdict, the substance of the motions for a new trial, the issues submitted and the deliberations of the jury, declares that the undisputed evidence established damages of \$9,919.00, concludes that the verdict for \$4,750.00 was inadequate, declares that in its opinion the issue of causation was a difficult and close one for the jury and concludes that the jury did not give proper consideration to the evidence on either the issue of liability or the issue of damages (R. 57-60).

Appellee acknowledges that the damages actually suffered by Appellant "far exceed the sum awarded" (R. 44). Appellant admits that the verdict of the jury on the issue of liability could have gone either way, and regardless of which party it favored, it would have been supported by credible and substantial evidence (R. 36).

In its order, the Court expressly denied defendant-Appellee's motion for a new trial. The Court then vacated and set aside the verdict of the jury in its entirety and granted a new trial limited to the issues which were submitted to the jury, to-wit: liability and damages (R. 60-61).

It should be noticed that this memorandum and order was issued and entered on the twenty-seventh day after entry of the judgment.

SPECIFICATION OF ERRORS.

1. The Court acted in excess of its jurisdiction when, some twenty-seven days after the date on which the judgment was entered, on its own initiative, it vacated and set aside that portion of the verdict of the jury finding defendant liable for damage to plaintiff's peach orchard, and further acted in excess of its jurisdiction when it ordered a new trial on the issue of liability or causation.

2. The Court abused its discretion by forcing upon the moving party a new trial of a scope beyond that which said party had requested.

ARGUMENT.**A. THE COURT ACTED ON ITS OWN INITIATIVE
IN EXCESS OF ITS JURISDICTION.**

The jury returned a verdict in favor of appellant but fixed inadequate damages. Judgment on the verdict is entered on April 25, 1958. Seven days later, appellant notices a motion to vacate that portion of the judgment fixing damages and for a new trial limited to the issue of damages. Twenty-seven days later, the court issues its order in which it expressly denies appellee's motion for a new trial on all issues, in which it neither grants nor denies appellant's motion for a new trial on the limited issue of damages, but in which, in addition to that which appellant had requested it to do, it vacated the verdict of the jury on the issue of liability as well as its verdict fixing damages and ordered a new trial on the issue of liability, as well as the issue of the nature and extent of damages.

Rule 59 (d) of *Federal Rules of Civil Procedure*, Title 28, U.S.C.A., fixes the jurisdiction of the trial court to act on its own initiative in granting a new trial. It reads as follows:

“Not later than 10 days after entry of judgment, the Court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party, and in the order shall specify the grounds therefor.”

In *Kanaster v. Chrysler Corporation*, 199 Fed. 2d 610, 615 (10th Cir. 1952), the Court states:

“Here the trial court purported to grant the motion for a new trial more than six months after

entry of the judgment, on a ground not asserted in the motion. In so doing, he acted on his own initiative and beyond his jurisdiction.

A clear distinction has always been drawn between orders granting a new trial which were within, and those without the jurisdiction of the court to grant. See *Fried v. McGrath*, 76 U. S. App. D.C., 388, 133 F. 2d 350. A long time ago, it was said that 'the vacating of a judgment and granting of a new trial, in the exercise of an acknowledged jurisdiction, leaves no judgment in force to be reviewed. If on the other hand, the order made was without jurisdiction on the court making it, then it is a proceeding which must be the subject of review by an Appellate Court.' *Phillips v. Negley*, 117 U.S. 665, 671, 6 S. Ct. 901, 903, 29 L. Ed. 1013".

The only grounds asserted in appellant's motion to vacate a portion of the verdict and for a limited new trial were:

"1. Inadequate damages appearing to have been given under the influence of passion or prejudice.
2. Insufficiency of the evidence to justify that portion of the verdict fixing plaintiff's damages."
(R. 19).

In *Nat. Farmers Union Auto & Cas. Co. v. Wood*, 207 Fed. 2d 659, 660 (10th Cir. 1953), the Court states:

"Even though a motion for a new trial is filed within ten days after entry of the judgment, the granting of a new trial on the ground not mentioned in the motion is to be treated as an action taken by the court on its own initiative. *Fried v.*

McGrath, 76 U.S. App. D.C. 388, 133 Fed. 2d 350; Bailey v. Slentz, 189 F. 2d 406; Kanaster v. Chrysler Corp., 10th Cir., 199 F. 2d 610, Cert. Denied 344 U.S. 921, 73 S. Ct. 388.”

And on page 662:

“It (the order for a new trial) was not entered within ten days after entry of the judgment . . . It purported on its face then and there to grant a new trial itself. It stated the grounds on which the new trial was then and there being granted. And no such grounds were included in any motion for a new trial filed within ten days after entry of the judgment. Therefore, the order must be treated as action on the initiative of the Court; and being taken more than ten days after entry of the judgment it came too late and was ineffective.”

Appellee filed a motion for a new trial on the tenth day after entry of the judgment. This motion was specifically denied in the order for a new trial. The grounds urged in Appellee’s motion were as follows:

“(1) That the Court erred in excluding certain evidence offered by defendant as to the condition of peach trees in Fresno and Merced Counties in 1957 and that said error was prejudicial to the rights of the defendant. (2) That the verdict of the jury was an improper and invalid verdict in that it was arrived at by compromise and that the verdict was the result of unintentional coercion by the Court, and (3) Newly discovered evidence which could not, with due diligence, have been presented by the defendant at the trial of this action.” (R. 37-38).

The grounds on which the trial court based its order vacating the verdict in its entirety and granting a new trial on the two issues submitted to the jury are, appellant believes, summarized in the last paragraph of the court's memorandum, set forth just prior to its order. However, to avoid the vice of lifting a quotation out of context, it is urged that the whole of the memorandum be read (R. 57-61). The last paragraph of the memorandum reads as follows:

“To me, the gross inadequacy of the verdict of the jury on damages is quite convincing that the jury did not give proper consideration to the evidence on the issue of liability. A motion for a new trial is addressed to the sound discretion of the Court. It is the duty of the Court to see that both parties to litigation receive a fair and impartial trial, based upon the law and the evidence. In order to accomplish this duty, I feel that a new trial must be granted on the two issues which were submitted to the jury. I feel that I have the power to do so, even though the plaintiff has restricted his motion for a new trial only on the issue of damages”.

The proposition that the jury did not give proper consideration to the evidence on liability was not urged or cited or referred to in either appellant's or appellee's motion for a new trial. Such a ground is not within the scope of any motion for a new trial filed within ten days after entry of the judgment. It is a ground urged by the Court on its own initiative.

Additional cases holding that the granting of a new trial more than ten days after the entry of the judg-

ment on a ground not included, mentioned or urged in any motion for a new trial, timely filed, or the granting a new trial at a time after the jurisdiction of the court to change the judgment had passed are: *Lebeck v. William A. Jarvis, Inc.*, 250 Fed. 2d 285, 289 (3rd Cir. 1957); *Fried v. McGrath*, 133 Fed. 2d 350, 355 (D.C. Cir. 1942); *Marshall's U. S. Auto Supply, Inc. v. Cashman*, 111 Fed. 2d 140, 142 (10th Cir. 1940), certiorari denied 311 U.S. 667, 61 S. Ct. 26, 85 L. Ed. 428; *Patton v. Baltimore & Ohio R. Co.*, 120 Fed. Supp. 659, 669 (1953), 214 Fed. 2d 129 (3rd Cir. 1954); *Fine v. Paramount Pictures*, 181 Fed. 2d 300, 303 (7th Cir. 1950); *Untersinger v. United States*, 181 Fed. 2d 953, 955 (2nd Cir. 1950); *Foster-Milburn Co. v. Knight*, 181 Fed. 2d 949, 951 (2nd Cir. 1950); *In re Dernet*, 215 Fed. 673, 679 (9th Cir. 1914); *Phillips v. Negley*, 117 U.S. 665, 671-672, 6 S. Ct. 901, 903, 29 L. Ed. 1013 (1886); and *Jackson v. Wilson Trucking Corp.*, 243 Fed. 2d 212, 216 (D.C. Cir. 1957).

This latter case, *Jackson v. Wilson Trucking Corp.*, supra, presents a situation similar to that of the case at bar in respect to the conduct of the trial judge in leaning far over backwards to give both parties to the litigation every possible break, and still accomplish an end he deemed essential to justice. The losing party had moved timely for judgment N. O. V. but had not included in his motion the appropriate alternate request for a new trial. The trial court apparently determined that the evidence, though slight, was sufficient to get the issue to the jury and thereafter,

such that he could not grant a judgment N. O. V. The trial judge gave it as his opinion that the greater weight of the evidence was against the verdict and stated, "Inasmuch as the motion that was filed was timely, I feel that I have a discretion to grant the lesser remedy (a new trial) instead of the greater one" (judgment N. O. V.) (p. 214). (Note the similarity in the language used by the trial judge in the Jackson case to that used by the trial judge in the case at bar.)

The appellate court held that the trial judge had gone beyond the scope of the motion before him and hence exceeded his jurisdiction and, at page 216, stated:

"When the trial judge in the present case found himself unable to grant the motion for judgment, there was no request for a new trial before him and the time within which he could order a new trial on his own initiative had long since expired. Accordingly, he was without authority to order a new trial."

In its opening statement concerning the action, the Appellate Court, at page 214, notes that this was an appeal from an order of the trial court awarding a new trial. Citing *Phillips v. Negley*, supra, the court approves the following rule:

"An order granting a new trial is not ordinarily reviewable. But where, as in the case at bar, such an order exceeds the power of the Court, it may be reviewed notwithstanding the absence of a final judgment."

B. THE TRIAL COURT ABUSED ITS DISCRETION.

Appellant was the prevailing party in the trial court. The jury found appellee liable for the injury to appellant's peach orchard, assessed his losses at \$4,750.00 and awarded those damages to him (R. 16-17). All parties agree that the issue of liability could have gone either way.

"The witnesses, Hench, Wilson, Hesse, Harper, Weigle and Brown all testified that the injury to the Grimm orchard was caused by the spray mixture, by an outside source, or by the oil in the spray. The witnesses, Thompson, Howard and Sessions, testified that the spray materials or the oil in the amounts used could not have caused this damage." (R. 36—From appellant's points and authorities in support of his motion for new trial limited to the issue of damages.)

"In my view of the evidence, the causation of the damages was a difficult and close issue for the jury to decide." (R. 60—From the court's memorandum and order on motions for a new trial.)

Nowhere in its motion for a new trial on all issues (R. 37-38), in its supporting affidavit (R. 38-42), or in its memorandum in opposition to plaintiff's motion for a new trial on the issue of damages alone (R. 43-47) does Appellee contend that the verdict of the jury on the issue of causation was not fully supported by credible and substantial evidence.

The affidavit of James S. Peden, who was the foreman of the jury that heard and determined this cause, discloses that the jury deliberated for approximately

seven hours on the issue of liability and that at or about 11:00 P.M. reached a unanimous decision to the effect that the defendant was liable for the injury to the orchard; that it never was deadlocked on that issue; that the only issue on which the jury appeared to be deadlocked was the amount of loss the plaintiff had suffered, and that the amount of damages awarded was the result of a compromise (R. 48-49).

Both parties together with the Court agree that the amount of damages awarded by the jury were grossly inadequate (R. 32, 44, 59).

Based on the above, Appellant contends that he was the only party who had an adequate legal ground on which to complain about the verdict and judgment. That ground was inadequacy of the sum awarded as damages. Appellant did complain, and, within the time allowed by the Federal Rules of Civil Procedure, filed his motion for a new trial on the grounds of an inadequate award of damages and insufficiency of the evidence to justify the sum of damages arrived at by the jury.

Appellant had won at least a partial victory. He was in a position where he could have retired from the field to lick his wounds and cogitate upon the vagaries of a trial by jury or he could move forward in an effort to obtain full justice. He did move forward and suddenly, on May 22, 1958, found the rug pulled out from under him. He is deprived of even his partial victory. The choice is no longer his. It has been taken from him by the vacating of the judg-

ment in its entirety. Surely, as the aggrieved party, the appellant should have had the opportunity to choose between the half-loaf handed him by the jury and no loaf at all left to him by the trial judge.

In *Atlantic Coast Line Rr. Co. v. Bennett*, 251 Fed. 2d, 934, 939 (4th Cir. 1958), involved a situation where the jury had been erroneously instructed on the issue of punitive damages, but liability was admitted and no error was found in the compensatory damages awarded. It was found that the evidence on primary negligence and wilful misconduct were so inseparably mixed that it was not clear that no injustice would result from a trial limited to the issue of wilful misconduct and punitive damages. In these circumstances, the Appellate Court states:

“However, since liability is admitted and no error appears in the amount of compensatory damages allowed after a full trial in the District Court, we think it proper to give the plaintiff an opportunity to elect between a new trial of the action as a whole and a retention of the unobjectionable portion of the judgment.” (The Appellate Court ordered entry of its judgment reversing the trial court and ordering a new trial withheld for fifteen days to allow the plaintiff to make its election and if so advised file its remittitur of the punitive damages.)

It is the conduct of the trial court in completely depriving appellant of any choice in the matter that appellant contends was an abuse of the Court’s discretion. The trial court seized upon appellant’s mo-

tion and ran away with it, forcing upon the only aggrieved party something wholly beyond the scope of that which he sought.

In *Whitman v. Pitrie*, 220 Fed. 2d, 914, 918, 919 (5th Cir. 1955), in discussing an appeal from an order denying a motion for a new trial on the ground that the award of damages was excessive, the Court states:

“While the seventh amendment forbids the power to this court to re-examine the facts found by a jury otherwise than according to the rules of common law, it does not prevent this court from reviewing the questions of law presented by the decision of the trial court on the motion for a new trial. When the court abuses its discretion, that amounts to a legal error and may be reviewed as such. *Virginia Ry. Co. v. Armentrant*, 4 Cir. 166 F. 2d., 400, 407, 408, 4 A. L. R. 2d 1064; 6 *Moore’s Federal Practice*, 2nd Ed., Para. 59.08 (6), P. 3827, Notes 29 and 30.”

And at p. 919:

“In reviewing a motion for a new trial based on the ground of the inadequacy or excessiveness of the verdict, as well as one based on the ground that the verdict is against the weight of the evidence, the rule applies that . . . an abuse of discretion is an exception to the rule that the granting or refusing of a new trial is not assignable as error. *Commercial Credit Corp. v. Pepper*, 187 F. 2d 71, 75-76 (5th Cir. 1951); *Huston Coca Cola Bottling Co. v. Kelley*, 131 F. 2d 627, 628 (5th Cir. 1942); *Fort Worth & Denver Ry. Co. v. Roach*, 219 F. 2d 351, 352 (5th Cir. 1955)”.

In addition to *Whitman v. Pitrie*, supra, the following cases support appellant's contention that an interlocutory order of the district court is reviewable by the Court of Appeals, if the making of the order was an abuse of discretion. The basis for the review is that whether or not the trial court abused its discretion is an issue of law not of fact: *Davis v. Yellow Cab Co.*, 220 Fed. 2d 790, 791 (5th Cir. 1955); *Turner v. United States*, 229 Fed. 2d 944, 945 (6th Cir. 1956); *Uhl v. Echols Transfer Co.*, 238 Fed. 2d 760, 761 (5th Cir. 1956).

CONCLUSION.

In connection with the District Court's order vacating and setting aside the verdict and judgment in its entirety, appellant contends that the trial court acted in excess of its jurisdiction under rule 59 (d) when it vacated and set aside that portion of the verdict and judgment declaring appellee to be liable for the injury to appellant's peach orchard and his losses suffered by reason of that injury. The District Court's order vacating and setting aside of that portion of the verdict and judgment fixing and awarding damages, on the ground of inadequacy, is supported by appellant's motion and the grounds set forth therein and was an act wholly within the Court's jurisdiction.

In connection with the District Court's order granting a new trial on both the issue of causation and the

issue of damages, appellant contends that the trial court acted in excess of its jurisdiction when it granted a new trial on the issue of causation. That portion of the order granting a new trial on the issue of the nature and extent of appellant's damages on the ground that the sum assessed and awarded was grossly inadequate was supported by appellant's motion and the grounds urged therein and was an act wholly within the court's jurisdiction.

Appellant had requested and moved for a new trial on the limited issue of the nature and extent of his damages. If the trial court abused its discretion in forcing upon appellant a new trial on the dual issues of causation and damages, which appellant contends that it did, the only abuse of discretion was in ordering that the issue of causation be included in the scope of the new trial. There was not, and could not be, any abuse of discretion in granting to appellant that which he had requested, because, to that extent, appellant had already exercised his right to elect.

Because only portions of the trial court's orders were in excess of its jurisdiction and in abuse of its discretion, should appellant prevail here, it would appear that this Court of Appeals should:

1. Reverse and set aside that portion of the District Court's order on motions for a new trial wherein it vacated and set aside the verdict and judgment in its entirety;

2. Order that portion of the verdict and judgment finding appellee liable for the injury to appellant's

peach orchard and his losses suffered by reason of that injury to be reinstated.

3. Reverse and set aside that portion of the District Court's order on motions for a new trial granting a new trial on all issues which were submitted to the jury;

4. Order a new trial on the limited issue of the nature and extent of appellant's damages.

Assuming, *arguendo*, that the District Court has never determined whether or not the issues of proximate cause and extent of damages are so interwoven and inseparable that a trial on the issue of damages alone cannot be had without some prejudice or injustice resulting, and for that reason the trial court has discretion to deny a motion for a new trial limited to the issue of damages, even though it be acknowledged that the damages awarded are grossly inadequate, this appellate court, noting that the trial court never expressly granted or denied appellant's motion, could order the verdict and judgment reinstated and order the trial court to further consider appellant's motion and determine whether the interests of justice would best be served by granting or denying his motion.

A third alternative, that of allowing appellant, as the only aggrieved party, a reasonable time to elect between accepting the verdict and judgment as originally entered and submitting to the new trial on the dual issues of causation and damages, might be considered. However, the vice of this third alternative

is that, by inference, it would constitute a finding that the District Court had authority or jurisdiction to make the order that it did make, notwithstanding the complete absence of any reference to the grounds on which the order was based in the motions filed within the time allowed by law.

Dated, Bakersfield, California,
November 12, 1958.

Respectfully submitted,

CONRON, HEARD & JAMES,
WAYNE M. HAMILTON,
Attorneys for Appellant.

No. 16,091

IN THE

United States Court of Appeals
For the Ninth Circuit

CHARLES W. GRIMM,

Appellant,

VS.

CALIFORNIA SPRAY-CHEMICAL CORPORATION,
TION,

Appellee.

On Appeal from the United States District Court
for the Southern District of California,
Northern Division.

Honorable Gilbert H. Jertberg, Judge.

BRIEF FOR CALIFORNIA SPRAY-CHEMICAL CORPORATION,
APPELLEE.

WILD, CHRISTENSEN, BARNARD & WILD,
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FILE

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PAUL P. O'BRIEN, C.

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Honorable Gilbert H. Jertberg, Judge.

**BRIEF FOR CALIFORNIA SPRAY-CHEMICAL CORPORATION,
APPELLEE.**

I.

INTRODUCTION.

The decision in this case rests upon, and is to be determined by, the power of the Court in passing upon a motion for a new trial where the moving party requests a new trial as to only some of the issues. The second point raised by appellant in his brief, that is, whether the order appealed from is an appealable

order, is, we believe, determined by the same factors which determine the first point, and, therefore, a decision as to one is a decision as to both.

Appellant has not argued, and, apparently, does not contend, that, assuming the Court to have the power to make the order made, it was nonetheless an abuse of discretion. In other words, we may assume that if the Court had the power to order a new trial as to all issues, appellant is satisfied with the exercise of that power.

Accordingly, we will look at the problem from the standpoint of jurisdiction, and will not discuss the various factors involved in the exercise of the discretionary power.

Due point should be mentioned, however, and that is that until the filing of appellant's opening brief we did not know that he was *not* going to attach the order of the Court from the standpoint of being an abuse of discretion. We had, of necessity, therefore, to be prepared for any contingency.

We believe that no citation of authorities is necessary to establish the elemental rule that the right or obligation of the Court in granting or refusing to grant a partial new trial is to be determined by the closeness of the issues and whether one or more of those issues can be divorced from the others without doing an injustice to some of the parties. When appellant appealed from the order of the trial Court refusing to order such a separation of issues, we felt we must, of necessity, present the entire record so

that the “togetherness” of the entire matter could be illustrated. Now, however, appellant has not challenged this, and, in fact, on page 28 of his brief he, for all intents and purposes, concedes that the Court was entitled to do what it did—if it had the power.

Our only interest then is in jurisdiction and not in the discretionary power of the Court.

II.

APPEALABILITY OF ORDER.

The only other point (other than the jurisdiction of the Court) which appellant raises is whether the order appealed from is an appealable order. If it is not, then, of course, this appeal should be dismissed and the primary question reserved for future decision.

Ordinarily it is universally held that an order on a new trial motion is *not* appealable (Moore’s Federal Practice, Vol. 6, page 3891). This is because Section 1291 of Title 28, U.S.C.A., grants jurisdiction on appeal from *final decisions*. As the discussion in Moore’s points out, whether the motion be granted or denied, it, in itself, is never the final decision. Sooner or later there will be a *judgment* and upon appeal from that judgment all prior orders may be reviewed.

This is the ordinary rule. An exception has grown, which is now pretty well recognized. That exception is that if the Court exceeds its *jurisdiction* in making the order concerning a new trial (Moore’s, Vol. 6,

page 3899) an appeal or an extraordinary writ will be allowed because, except for the unauthorized action of the Court, there would have been a final judgment.

In other words, the appealability of the present order is determined by whether or not the Court had jurisdiction to make such order—leaving out questions affecting the propriety of the order as a discretionary act. Thus it appears that both of appellant's issues will be resolved by the determination of that one question. If the Court had jurisdiction, the order is not appealable; but, on the other hand, since only the *power to make the order* is challenged, it would be affirmed anyway—so, actually, only one problem is presented—jurisdiction.

III.

THE TRIAL COURT HAD JURISDICTION TO ORDER A NEW TRIAL ON ALL ISSUES.

There are many cases in which the propriety of granting or refusing to grant a limited new trial is discussed and we believe the applicable rules are fairly well understood. Typical of these cases are *Schuerholz v. Roach*, 58 Fed. (2d) 32, and *Southern Railway Company v. Madden*, 235 Fed. (2d) 198. But these cases have not involved the issue presented here—where the moving party requests a new trial on only part of the issues and the Court orders that all issues be retried. And, in fact, we have been able to find no cases in the United States Courts where that problem has been discussed, nor has counsel for appellant cited any.

The problem has been considered, however, by the Supreme Court of California in two cases, *Hamasaki v. Flotho*, 39 Cal. (2d) 602 and *Leipert v. Honold*, 39 Cal. (2d) 462. We realize, of course, that these decisions are not binding upon this Court, but there is a similarity in the fact that the State Code sections, the same as Rule 59 of the Federal Rules of Civil Procedure, do not attempt to define the power of the Court on motions for new trial with complete exactitude and it was, therefore, necessary for the California Supreme Court to decide whether inherent power existed.

Since these two cases are the only ones discussing the question, we would like to take the liberty of following the reasoning of the Court in the *Hamasaki* case by quoting the following:

“The controlling question, therefore, is whether or not the trial court, on plaintiffs’ motion for a new trial on the issue of damages only, had power to grant a new trial on all issues.

This question is analogous to that presented when an appeal is taken from only a part of a judgment. To simplify litigation a party who is aggrieved by a judgment is ordinarily entitled to limit his appeal to the parts thereof with which he is dissatisfied. Similarly, when he is seeking relief in the trial court by way of a new trial, he ordinarily may seek a retrial only of the issues on which the decision has been adverse to him. In either case, however, situations may arise where the issues are so interwoven that a partial retrial would be unfair to the other party. When, as in the present case, for instance, the jury has, by

compromising the issues of liability and damages, inextricably interwoven those issues, a retrial of the damages issue alone based on the erroneous assumption that defendant's liability has been determined would be extremely unjust to him. A situation is thus presented where the plaintiff has been aggrieved, but the specific relief he seeks may not be granted without doing an injustice to the defendant. Since the relief requested may not be granted, the trial court, if the issue is presented by motion for a limited new trial, or the appellate court, if the issue is presented by a partial appeal, must do one of two things. It must either deny all relief, or order a new trial on both issues.

In the case of partial appeals it is settled that the court may review as much of the judgment as is necessary to give the appellant the relief he seeks even though it is necessary to reverse parts of the judgment with which he has no quarrel and from which neither party has appealed. (*Milo v. Prior*, 210 Cal. 569, 571 (292 P. 647); *Blache v. Blache*, 37 Cal.2d 531, 538 (233 P. 2d 547); *American Enterprise, Inc. v. Van Winkle*, ante, p. 210 (246 P.2d 935); *Bailey v. Bailey*, 60 Cal. App. 2d 291, 293 (140 P.2d 693).)

Logically the same rule should govern the trial court when passing on a motion for a limited new trial.

It is suggested that in a particular case both parties may prefer the judgment as originally entered to the expense and uncertainty of a new trial on all issues, and that therefore the trial court should not have jurisdiction to grant a complete new trial in the absence of a motion therefor. There is no reason why, if a limited new

trial cannot be granted, the parties should not be allowed to adopt the jury's compromise as their own. In such a case, however, the trial court would undoubtedly respect their preference in this respect and deny any new trial at all. (Cf., *Leipert v. Honold*, ante, p. 462 (247 P. 2d 324).) Accordingly, it is not necessary to limit the jurisdiction of the trial court in passing upon a motion for a partial new trial to prevent a complete new trial that neither party wants. If the defendant does not wish a new trial he need not move for one, and if the plaintiff does not wish a complete new trial, if he cannot have a partial new trial, he need simply say so."

The applicability of this reasoning is as important in United States Courts as it is in the Courts of California. That the Court possesses such inherent power seems only just and equitable. Surely, rules of procedure, which are designed only to speed and assist the administration of justice should not be used to thwart it! The trial Court, as quoted by appellant, felt that justice required that all issues be submitted on a new trial. To hold that such order was in excess of its jurisdiction is to use the rules of procedure as a sword to defeat the administration of justice; such, obviously, could never have been intended by the authors of the rules. Appellant, having initiated the new trial proceedings, opened the gateway for the exercise by the Court of all of its inherent power to administer justice in a complete and equitable manner.

One further matter remains to be mentioned. Appellant, in offering several alternatives as the decision of this Court, has overlooked one important fact. The

trial Court has held that the verdict, as returned, was not a true verdict, that it represented a decision on the question of liability no more than it did on damages.

Thus, if the order is to be reversed only one result is possible—the trial Court must be given the opportunity to decide where the interests of justice would be best served by allowing the verdict to stand, or by ordering a partial new trial. Any of the other alternatives suggested overlook the fact that the Court has not passed upon this question.

IV.

CONCLUSION.

We respectfully submit that the action of the trial Court was within its jurisdiction, and that since its action has not been challenged from the standpoint of exercise of discretion the order must be affirmed; or, in the alternative, the order must be held to be non-appealable and the appeal dismissed.

Dated, Fresno, California,
December 10, 1958.

Respectfully submitted,
WILD, CHRISTENSEN, BARNARD & WILD,
ROBERT M. BARNARD,
Attorneys for Appellee.

No. 16096 ✓

United States
Court of Appeals
for the Ninth Circuit

JOSEPH F. BLAYLOCK, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

ORLEANS VENEER AND LUMBER CO., a corporation, Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeals from the United States District Court for the Northern
District of California, Southern Division

FILED

APR - 6 1959

Phillips & Van Orden Co., Fourth and Berry Sts., San Francisco, Calif.—3-26-59

PAUL P. O'BRIEN, CLERK



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.].

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In the United States District Court, Northern District of California, Southern Division

Civil No. 36569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH F. BLAYLOCK, HYRUM S. SIMS,
and JOHN H. STEVENS,

Defendants.

COMPLAINT

First Claim

1. This is a civil action brought by the United States of America to which this court's jurisdiction attaches by virtue of Section 1345, Title 28, United States Code.

2. Defendants Joseph F. Blaylock and John H. Stevens both reside in Siskiyou County, and defendant Hyrum S. Sims resides in Placer County, within the jurisdiction of this court, and the real property which is the subject of this action is located within Siskiyou County, California, within the jurisdiction of this court.

3. On September 13, 1921, John Patterson obtained Homestead Patent No. 822606 which described the following land:

The Northeast quarter of the Northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$), the East half of the East half of the Northwest quarter of the Northwest quarter ($E\frac{1}{2}E\frac{1}{2}NW\frac{1}{4}NW\frac{1}{4}$), and the

North half of the North half of the Southeast quarter of the Northwest quarter ($N\frac{1}{2}N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$), and the Northeast quarter of the Northeast quarter of the Southwest quarter of the Northwest quarter ($NE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$) of Section 34, Township 13 North, range 6 East, H.M., containing 62.50 acres, and the patent was recorded in the Official Records of Siskiyou County in 1956 in Book 371 at page 275. The survey of the township in which said land is located is so erroneous that the patentee mistakenly entered and occupied under the homestead certain land which is now known not to be parts of Section 34 as described in the patent, but which is now known to be portions of the Northwest quarter of the Southwest quarter ($NW\frac{1}{4}SW\frac{1}{4}$), and the Southwest quarter of the Northwest quarter ($SW\frac{1}{4}NW\frac{1}{4}$) of Section 27, and portions of the Southeast quarter of the Northeast quarter ($SE\frac{1}{4}NE\frac{1}{4}$), and the Northeast quarter of the Southeast quarter ($NE\frac{1}{4}SE\frac{1}{4}$) of Section 28, Township 13 North, Range 6 East, H.M. Plaintiff is now and has at all times been the owner of the lands in Section 34 described herein.

4. The land described in Paragraph 3 was purportedly sold at a tax sale in the year 1947 to defendant Sims and defendant Sims did occupy and receive the benefit from the land which was previously occupied by the original patentee, John Patterson, and which was at all times believed by the parties herein to be the land subject to Patent No. 822606. During his occupancy of said land the

defendant Sims caused a survey to be made in March 1952, at which time it was discovered that the land which had been occupied and patented had been erroneously described in Patent No. 822606. During the occupancy of said homestead by defendant Sims the timber was cut and removed therefrom by defendants Blaylock and Stevens, and the purchase price of the timber was paid to defendant Sims.

5. Defendant Sims sold to defendant Blaylock the land with the improvements thereon which had been occupied by defendant Sims by deed dated June 10, 1956, recorded in Volume 371 at page 26 of the Official Records of Siskiyou County, California, which deed conveyed the land according to the erroneous description contained in Patent No. 822606, being parts of Section 34 as described in Paragraph 3. At that same time defendant Sims gave defendant Blaylock a quitclaim deed to the portions of Sections 27 and 28 described in Paragraph 3. Defendant Blaylock accepted both conveyances with actual knowledge that the land described in the deed of June 10, 1956, as parts of Section 34, was not located as described therein but was in fact located in parts of Sections 27 and 28, as hereinabove alleged.

6. Defendant Blaylock claims a right to cut the timber on the lands in Section 34 above described, and on June 18, 1957, defendant Blaylock advised plaintiff that he intended to begin cutting that timber on Monday, June 24, 1957. On June 21, 1957, defendant Blaylock informed plaintiff that he had

already commenced cutting the timber on Section 34 earlier that day.

7. Defendant Blaylock will, unless restrained, continue the wrongful and unlawful cutting and removal of the timber on the lands on Section 34 hereindescribed in paragraph 3. The unlawful and wrongful actions of defendant Blaylock will deprive plaintiff of the benefits and control of the timber, and will result in great and irreparable injury to plaintiff's real property and the standing timber thereon in the parts of Section 34 described in Paragraph 3. Plaintiff alleges on information and belief that defendant Blaylock would be unable to respond to plaintiff in damages for the cutting and removal of the timber.

Second Claim

1. This is a claim brought by the United States of America for damages for trespass and conversion of timber, and is alternative to the First Claim herein.

2. Plaintiff is now and was at all times material to this complaint the owner of the lands in Section 27 and 28 described in Paragraph 3 of the First Claim and the timber thereon.

3. During the year 1952 and in subsequent years the defendants Sims, Blaylock and Stevens cut and removed approximately three million board feet of plaintiff's timber from the plaintiff's lands on Sections 27 and 28. The fair market value of which timber was at least \$15,000.

Wherefore, plaintiff prays:

1. That a Temporary Restraining Order, and a Temporary Injunction and a Permanent Injunction be issued against defendant Joseph F. Blaylock restraining and enjoining him from cutting, removing, mutilating or destroying timber on lands described as the NE $\frac{1}{4}$ NW $\frac{1}{4}$, the E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$, and the N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, and the NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ of Section 34, Township 13 North, Range 6 East, H.M.; that the court decree a reformation of Patent No. 822606 to show that the lands patented are the parts of Sections 27 and 28 described in Paragraph 3 of the First Claim; for a declaratory judgment that plaintiff is the owner of the part of Section 34 described above; or, in the alternative for judgment against defendants Joseph F. Blaylock, John H. Stevens, and Hyrum S. Sims, jointly and severally, in the amount of Fifteen Thousand Dollars (\$15,000).

2. For judgment against defendants Joseph F. Blaylock, John H. Stevens, and Hyrum S. Sims, jointly and severally, for costs of this action; and for such other relief as to this court may seem just and proper.

/s/ LLOYD H. BURKE,

United States Attorney,

/s/ JAMES B. SCHNACKE,

Assistant U. S. Attorney,

/s/ BERNARD PETRIE,

Assistant U. S. Attorney,

Attorneys for Plaintiff.

Duly Verified.

[Endorsed]: Filed June 21, 1957.

In the United States District Court, Northern District of California, Southern Division

Civil No. 36569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH F. BLAYLOCK; GUY HEAD; ORLEANS VENEER and LUMBER CO., a corporation; HYRUM S. SIMS; EDWARD E. HEAD, doing business as HEAD LUMBER COMPANY and as SISKIYOU MILLS, a partnership; JOHN H. STEVENS; and HAROLD LEEVERS and IRIS LEEVERS, a partnership, doing business as WILLAMETTE BUILDERS SUPPLY,

Defendants.

AMENDED COMPLAINT

The United States of America, for its amended complaint, states:

First Claim

1. Plaintiff brings this action under 28 U.S.C. § 1345 against defendants Blaylock, Guy Head and Orleans Veneer and Lumber Co.

2. Prior to 1921 John Patterson occupied certain land (hereinafter called parcel 1) in the Klamath National Forest, Siskiyou County, California, as a homestead under entry number 02665 and applied for a patent covering the land.

3. On September 13, 1921, plaintiff issued to Patterson Homestead Patent No. 822,606, which

patent contained the following description intended by plaintiff and Patterson to cover parcel 1:

Northeast quarter of the northwest quarter, the east half of the east half of the northwest quarter of the northwest quarter, the north half of the north half of the southeast quarter of the northwest quarter and the northeast quarter of the northeast quarter of the southwest quarter of the northwest quarter of Section thirty-four in Township thirteen north of Range six east of the Humboldt Meridian, California, containing sixty-two and fifty-hundredths acres.

4. The description contained in Homestead Patent No. 822,606, because of mistake, did not cover parcel 1 but instead covered another parcel of land owned by plaintiff (hereinafter called parcel 2).

5. In June, 1943, a deed was executed between the Tax Collector of Siskiyou County and the State of California which deed purported to transfer certain property to the State of California for non-payment of taxes and which deed contained the following description: "Homestead Entry #02655 in NW $\frac{1}{4}$ Desig. Plat #4 Sec 34 Twp 13 R, 6E HM Ditch and Water right".

6. In January, 1946, defendant Sims as a result of a tax sale took a deed from the State of California with the following description: "H. E. #02665 Por. of NW $\frac{1}{4}$ (Ditch & Water Right) Section 34, Twp. 13 North, Range 6 East HM". Defendant Sims intended to buy parcel 1.

7. In 1952 defendant Sims caused a survey of

parcel 1 to be made. The survey disclosed the mistake made in the description contained in Homestead Patent No. 822,606. According to the survey, parcel 1 lies in sections 27 and 28 instead of in section 34, Township 13 North, Range 6 East, Humboldt Meridian.

8. The true description of parcel 1 is not that contained in Homestead Patent No. 822,606 but is as follows:

From the quarter corner common to sections 20 and 29, Township 13 North, Range 6 East, Humboldt Meridian, South 66 degrees 09 minutes east for 8,038.96 feet, thence east 1,650 feet, thence north 1,650 feet, thence west 1,650 feet and thence south 1,650 feet.

9. In 1952 plaintiff agreed to allow defendant Sims to exercise acts of ownership in parcel 1, and defendant Sims agreed to seek a correction of his documents of title at such time as an official resurvey could be made.

10. Thereafter, in 1953, 1955 and 1956 defendant Sims caused parcel 1 to be logged.

11. In July, 1956, defendant Sims conveyed his interest in parcel 1 to defendant Blaylock by quitclaim deed and also delivered to defendant Blaylock a deed containing the description contained in Homestead Patent No. 822,606. When taking both deeds defendant Blaylock knew or should have known that any interest of defendant Sims in parcel 2 was subject to being divested by plaintiff.

12. In July, 1956, defendant Blaylock delivered to defendant Guy Head a deed of trust containing

the description contained in Homestead Patent No. 822,606. That deed of trust has not been recorded.

13. At 8:30 a.m. on July 1, 1957, a notice of the pendency of this action was filed by plaintiff with the County Recorder of Siskiyou County.

14. On December 1, 1956, defendant Blaylock delivered to defendant Orleans Veneer and Lumber Co. an instrument which purported to assign his interest in the deed taken from defendant Sims containing the description contained in Homestead Patent No. 822,606. The instrument did not pass any legal interest in parcel 2 to defendant Orleans Veneer and Lumber Co. When receiving that instrument defendant Orleans Veneer and Lumber Co. knew or should have known that any interest of defendant Blaylock in parcel 2 was subject to being divested by plaintiff.

15. Defendant Blaylock claims to own parcel 2. He threatens to log parcel 2 and on June 21, 1957, cut timber on parcel 2.

16. Any logging by defendant Blaylock on parcel 2 would result in great and irreparable injury to plaintiff.

Second Claim

1. Plaintiff brings this action under 28 U.S.C. § 1345 against defendant Sims.

2. Plaintiff realleges paragraphs 2 through 8 and paragraph 10 of the first claim.

3. After the survey of his property in 1952 defendant Sims by letter dated March 19, 1952, copy of which is attached hereto as exhibit 1, advised

plaintiff of the mistake in the description in Homestead Patent No. 822,606 and asked that his ownership of parcel 1 be recognized. Defendant Sims, in writing exhibit 1 and at other times thereafter, agreed to refrain from exercising any acts of ownership over parcel 2 and to seek a correction of the description contained in his documents of title to show his ownership of parcel 1.

4. Thereafter, by letter dated July 23, 1952, copy of which is annexed hereto as exhibit 2, plaintiff recognized the rights of defendant Sims in parcel 1 and agreed to accept an amended patent description at such time as a re-survey could be made.

5. In July, 1956, defendant Sims conveyed his interest in parcel 1 to defendant Blaylock by quitclaim deed and also delivered to defendant Blaylock a deed containing the description contained in Homestead Patent No. 822,606, in breach of his agreement with plaintiff.

6. In July, 1956, defendant Blaylock delivered to defendant Guy Head a deed of trust covering parcel 2.

7. On December 1, 1956, defendant Blaylock delivered to defendant Orleans Veneer and Lumber Co. an instrument of assignment purporting to cover parcel 2.

8. If defendants Blaylock, Guy Head or Orleans Veneer and Lumber Co. are able to resist plaintiff's action for reformation stated in the first claim, plaintiff will lose parcel 2 because of the breach by defendant Sims alleged in paragraph 5.

9. Parcel 2 is worth \$15,000.

Third Claim

1. Plaintiff brings this action under 28 U.S.C. § 1345 against defendants Sims, Ed Head, Stevens and Blaylock.

2. Plaintiff realleges paragraphs 2 to 8 of the first claim.

3. Plaintiff is and was at all times pertinent hereto the owner of parcel 1 and the timber standing thereon.

4. In 1953, 1955 and 1956 defendant Sims trespassed upon parcel 1 and caused to be logged therefrom 2,355,970 feet board measure worth \$19,601.

5. In April and May, 1953, defendant Ed Head, doing business as the Head Lumber Company, trespassed upon parcel 1 and logged therefrom 1,554,780 feet board measure worth \$13,993.

6. In September, October and November, 1955, defendants Stevens and Blaylock trespassed upon parcel 1 and logged therefrom 660,170 feet board measure worth \$4,621.

7. In April and May, 1956, defendant Blaylock trespassed upon parcel 1 and logged therefrom 141,020 feet board measure worth \$987.

Fourth Claim

1. Plaintiff brings this action under 28 U.S.C. § 1345 against defendants Ed Head, Orleans Veneer and Lumber Co., Harold Leever and Iris Leever.

2. Plaintiff realleges paragraphs 2 to 7 of the third claim.

3. In April and May, 1953, defendant Ed Head, doing business as the Head Lumber Company,

bought 1,554,780 feet board measure of plaintiff's timber cut in trespass worth \$13,993 without compensating plaintiff.

4. In September and October, 1955, defendant Ed Head, doing business with others as Siskiyou Mills, a partnership, bought 527,790 feet board measure of plaintiff's timber cut in trespass worth \$3,694.53 without compensating plaintiff.

5. In October, 1955, defendant Orleans Veneer and Lumber Co., a corporation, bought 57,500 feet board measure of plaintiff's timber cut in trespass worth \$402.50 without compensating plaintiff.

6. In October and November, 1955, defendants Harold Leever and Iris Leever, doing business as Willamette Builders Supply, a partnership, bought 74,880 feet board measure of plaintiff's timber cut in trespass worth \$524.16 without compensating plaintiff.

7. In April and May, 1956, defendant Ed Head, doing business with others as Siskiyou Mills, a partnership, bought 141,020 feet board measure of plaintiff's timber cut in trespass worth \$987.00 without compensating plaintiff.

Fifth Claim

1. Plaintiff brings this action under 28 U.S.C. § 1345 against defendant Sims.

2. Plaintiff realleges paragraphs 2 to 4 of the third claim.

3. Between 1953 and 1956 defendant Sims sold the timber logged from parcel 1 in trespass and by such sale was enriched unjustly in the sum of \$13,733.72.

4. Plaintiff has not been compensated for its timber sold by defendant Sims, and the sum of \$13,733.72 is rightfully due plaintiff.

Wherefore, plaintiff demands:

1. That a temporary restraining order, a preliminary injunction and a final injunction be issued against defendant Blaylock restraining him from entry upon parcel 2 and from logging the timber thereon.

2. That defendant Blaylock be compelled to deed to the plaintiff the following land:

Northeast quarter of the northwest quarter, the east half of the east half of the northwest quarter of the northwest quarter, the north half of the north half of the southeast quarter of the northwest quarter and the northeast quarter of the northeast quarter of the southwest quarter of the northwest quarter of Section thirty-four in Township thirteen north of Range six east of the Humboldt Meridian, California, containing sixty-two and fifty-hundredths acres.

and that such land be adjudged to belong to plaintiff free of any liens, including any liens which might be asserted by defendants Guy Head and Orleans Veneer and Lumber Co.

3. That reformation be decreed of Homestead Patent No. 822,606 to contain the following description:

From the quarter corner common to sections 20 and 29, Township 13 North, Range 6 East,

Humboldt Meridian, South 66 degrees 09 minutes east for 8,038.96 feet, thence east 1,650 feet, thence north 1,650 feet, thence west 1,650 feet and thence south 1,650 feet.

4. Alternatively to paragraphs 1, 2 and 3, judgment against defendant Sims for \$19,601, and against the following defendants, jointly and severally with defendant Sims, for the following amounts: Ed Head for \$18,674.53; Blaylock for \$5,608; Stevens for \$4,621; Orleans Veneer and Lumber Co. for \$402.50; and Harold Leever and Iris Leever for \$524.16.

5. Judgment against all defendants, jointly and severally, for costs and for such other and further relief as is just.

August 19, 1957.

/s/ LLOYD H. BURKE,
United States Attorney,
/s/ BERNARD PETRIE,
Assistant U. S. Attorney,
Attorneys for Plaintiff.

EXHIBIT No. 1

(Copy)

March 19, 1952

Klamath Forest Supervisor,
Yreka, California.

Dear Sir:

About five years ago I obtained a parcel of land amounting to 621½ acres in the Klamath forest. This was through a tax sale by Siskiyou County.

The land was advertised according to law, and sold to me as the highest bidder. Since then I have resided continually on same and have made my home there. This land was homesteaded by John Patterson in 1921 and lies in Section 34, Township 13N—R 6 E, Siskiyou County. Legal description as follows:

NE $\frac{1}{4}$ NW $\frac{1}{4}$ —E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ —NE $\frac{1}{4}$
NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ —N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ —
R6-E HM 62-50 Acres List 5-2436 Serial 02655

The buildings have been on the place approximately forty years and the corner marked by the forest service is clearly shown on a map prepared by A. F. Parrott, Siskiyou County official surveyor. I have spent quite a lot of money on a road to the place and rebuilding.

Last week I called Mr. Parrott to come down and survey this ground and mark all four corners. He ran a line from an established section line corner on the Klamath river road to my property and found that there was an approximate two thousand foot discrepancy in the locations. The place where I am living is in Section 27 and 28, and the land described legally as mine is in Section 34 an unimproved, untouched piece of heavily timbered land. The land I thought I owned has all my buildings on it and a large meadow, access road, fences, etc. What I want to do is to make an exchange so a new legal description will fit my ground.

For information and a complete clear map of the

situation, contact Mr. A. Parrott, Siskiyou County Surveyor.

Please advise me as soon as possible as to the procedure to pursue from this point on. I have contacted the Land Management Office here and they referred me to you as the necessary first step in this matter. This is an urgent matter, and if you can expedite it in any way, I would be very grateful.

Yours truly,

/s/ H. S. Sims

H. S. Sims

1316 O Street, Apt. 1, Sacramento, Calif.

EXHIBIT No. 2

(Copy)

July 23, 1952

U

Adjustments—Klamath

Patterson, John (H. E. Sims)

H.E. 02655 (List 5-2436)

Mr. H. E. Sims

1316 O Street, Apt. 1, Sacramento, California

Reference is made to your recent visit to our office and our letter of April 11, 1952.

To further clarify your understanding of our letter and conversation, the following is the situation that exists:

1. We recognize your right to the 62½ acre tract now occupied and marked by the property corner you described. You can go ahead with the development of the 62½ acre tract even though the de-

scription is in error. This includes cutting of the timber.

2. We would be willing to accept an amended patent description covering the 62½ acres when a re-survey is made.

3. It will be necessary for you to secure a special use permit for construction of a road to your tract. Application for such a road should be made to the District Ranger at Happy Camp, California.

We will be happy to cooperate with you in the future in settling any further problems that may come up.

Very truly yours,

R. W. Bower,

Forest Supervisor

cc—Ranger Scherer

RWBower/kd

Duly Verified.

[Endorsed]: Filed August 26, 1957.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now defendant Joseph F. Blaylock and answers the amended complaint on file as follows:

Denies, all and the singular, both generally and specifically, conjunctively and disjunctively, the allegations contained in the 1st, 2nd, 3rd, 4th and 5th of plaintiff's amended complaint except as follows:

1. Admits that plaintiff issued to John Patter-

son under Homestead entry numbered 02665 and patent number 822606, the patent covering the following described real property in Siskiyou County, California:

Northeast quarter of the northwest quarter, the east half of the east half of the northwest quarter of the northwest quarter, the north half of the north half of the southeast quarter of the northwest quarter and the northeast quarter of the northeast quarter of the southwest quarter of the northwest quarter of Section thirty-four in Township thirteen north of Range six east of the Humboldt Meridian, California, containing sixty-two and fifty-hundredths acres.

2. That the facts stated in paragraph 5 of the first claim are true.

3. That as a result of the tax sale on the State of California to H. E. Sims, the said H. E. Sims did take a deed from the State of California to a fractional portion of the southwest portion of the section 34 Township 13, N Range 6 E., Humboldt Meridian.

4. That defendant, Joseph F. Blaylock, did take a deed to the property described in paragraph 1, from H. E. Sims in July of 1956.

5. That defendant, Joseph F. Blaylock, did take a quit claim deed covering the personal property situated on fractional portions of sections 27 and 28, township 13 N, Range 6 E., Humboldt Meridian but not the real property itself.

6. That the facts alleged paragraph 12 of the

first claim are true except that this answering defendant has no knowledge of recordation.

7. That defendant, Blaylock, did deliver to Orleans Veneer & Lumber Company an assignment of the deed of the property described in paragraph 1 above.

8. That the facts alleged in paragraph 6 of second claim are true.

9. That the facts alleged in paragraph 7 of second claim are true.

For a First Affirmative Defense, This Answering Defendant Alleges:

I.

That defendant Joseph F. Blaylock is the owner in fee simple absolute of the following described land situated in Siskiyou County, California:

The Northeast quarter of the Northwest quarter ($NE\frac{1}{4}NW\frac{1}{4}$), the East half of the East half of the Northwest quarter of the Northwest quarter ($E\frac{1}{2}E\frac{1}{2}NW\frac{1}{4}NW\frac{1}{4}$), and the North half of the North half of the Southeast quarter of the Northwest quarter ($N\frac{1}{2}N\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$), and the Northeast quarter of the Southwest quarter of the Northwest quarter ($NE\frac{1}{4}NE\frac{1}{4}SW\frac{1}{4}NW\frac{1}{4}$) of Section 34, Township 13 North, Range 6 East, H.M., containing 62.50 acres.

II.

That defendant Joseph F. Blaylock purchased such real property from Hyrum Sims from a deed

recorded in the official records of Siskiyou County in Book 371 at page 275.

III.

That prior to the recordation of the aforesaid deed, defendant Joseph F. Blaylock did deposit with the Siskiyou County Title Co. the sum of \$12,000.00, together with instructions that upon their determination that title to the above described property would be insured in the said Joseph F. Blaylock in the sum of \$12,000.00, to deliver such money and to record such deed; that such transaction was undertaken by defendant Joseph F. Blaylock under the belief in good faith that the said Hyrum Sims did have the legal capacity to convey title to such property which said reliance was based upon the official records of the County of Siskiyou and the advice of the Siskiyou County Title Co.; that defendant Joseph F. Blaylock is informed and believes and therefore, alleges that defendant Hyrum Sims likewise believed that he was the owner of the above described property and that he had the legal authority to convey the same.

For a Second Affirmative Defense, This Answering Defendant Alleges:

I.

Re-alleges as if fully set forth at this point Paragraph I of defendant's first affirmative defense.

II.

That this answering defendant is the owner and possessed in fee simple absolute of such property

from deeds recorded in a chain of title from this answering defendant directly to the United States of America by virtue of its patent issued on or about September 13, 1921.

III.

That if any discrepancy in the land intended to be conveyed by the United States and the land conveyed did exist, such discrepancy has been known to the United States of America for the last five years and that the United States has made no attempt to alter, reform, reissue or otherwise correct the chain of title, as shown in the official records of the county recorder of Siskiyou County, California and that, therefore, said United States of America is guilty of laches or should be estopped to assert such defect or both.

Wherefore, this answering defendant prays that plaintiff take nothing by its complaint and that title to the within described property be quieted in defendant Joseph F. Blaylock as to any claims of the United States of America, and for such other and further relief as to the Court may seem just.

BURTON, LEE & HENNESSY,

/s/ By MICHAEL T. HENNESSY,

Attorneys for Defendant Joseph F.
Blaylock.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 5, 1957.

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

Comes now the Defendant Orleans Veneer and Lumber Co., a corporation, and severing itself from its co-defendants and answering the First Claim and Fourth Claim naming said Defendant, admits, denies and alleges as follows:

First Claim

I.

Answering Paragraph 2 of said First Claim, this Defendant having no information or belief upon the subject matter mentioned in said paragraph 2 of Plaintiff's First Claim, sufficient to enable it to answer any of the allegations therein contained, and placing its denial upon that ground, denies each, every, all and singular the allegations and statements set forth therein.

II.

Answering Paragraph 3 of said First Claim, this Defendant admits that on September 13, 1921 Plaintiff issued to Patterson Homestead Patent No. 822,606, covering the property described in said paragraph, and further denies each, every, all and singular the remaining statements and allegations in said paragraph contained.

III.

Answering Paragraph 4 of said First Claim, this Defendant having no information or belief upon

the subject matter mentioned in said paragraph 4 of Plaintiff's First Claim sufficient to enable it to answer any of the allegations therein contained, and placing its denial upon that ground, denies each, every, all and singular the allegations and statements therein contained.

IV.

Answering Paragraph 6 of said First Claim, this Defendant admits that as a result of the tax sale of the State of California to H. E. Sims that said H. E. Sims did take a deed from the State of California to a fractional portion of Section 34, Township 13 North, Range 6 East, Humboldt Meridian, and further denies each, every, all and singular the remaining statements and allegations in said paragraph contained.

V.

Answering Paragraphs 7, 8, 9 and 10 of said First Claim this Defendant having no information or belief upon the subject matter mentioned in said Paragraphs 7, 8, 9 and 10 of Plaintiff's First Claim, sufficient to enable it to answer any of the allegations contained therein, and placing its denial upon that ground, denies, each every, all and singular the statements and allegations set forth in said Paragraphs 7, 8, 9 and 10 of Plaintiff's First Claim.

VI.

Answering Paragraph 11 of said First Claim, this Defendant admits that Defendant Sims conveyed certain property to Defendant Blaylock by

deed in July of 1956 which deed contained the description in Homestead Patent No. 822,606, and as set forth in Paragraph 3 of Plaintiff's First Claim, and further answering said paragraph, this Defendant denies each, every, all and singular the remaining statements and allegations contained in said paragraph.

VII.

Answering Paragraphs 12 and 13 of said First Claim, this Defendant having no information or belief upon the subject matter mentioned in said Paragraphs 12 and 13 of Plaintiff's First Claim sufficient to enable it to answer any of the allegations contained therein, and placing its denial upon that ground, denies each, every, all and singular the statements and allegations set forth in said Paragraphs.

VIII.

Answering Paragraph 14 of said First Claim, this Defendant admits that on December 1, 1956 Defendant Blaylock delivered to this Defendant an instrument assigning and transferring to this Defendant all of Defendant Blaylock's right, title and interest in and to that certain deed of Defendant Sims to Defendant Blaylock containing the description as set forth in Paragraph 3 of Plaintiff's First Claim, a copy of which assignment and transfer to this Defendant, as recorded on December 11, 1956 in Siskiyou County Official Records, Volume 378, Page 346, is attached hereto, marked Exhibit A, and made a part hereof as though fully set forth herein, and further answering said Paragraph 14

of said First Claim, this Defendant denies each, every, all and singular the other and remaining statements and allegations set forth therein.

IX.

Answering Paragraph 15 of said First Claim, this Defendant admits that Defendant Blaylock claims to own the parcel herein described as Parcel 2, subject to the above assignment and transfer to this Defendant.

X.

Answering Paragraph 16 of said First Claim, this Defendant denies each, every, all and singular the statements and allegations set forth therein.

Fourth Claim

I.

Answering Paragraph 2 of said Fourth Claim, this Defendant realleges his answers to Paragraphs 2, 3, 4, 5, 6, 7 and 8 of its First Claim, as referred to in the Third Claim by reference in the Fourth Claim, and further, having no information or belief upon the subjects mentioned in Paragraphs 3, 4, 5, 6, and 7 of said Third Claim, as referred to in the Fourth Claim, sufficient to enable it to answer any of the allegations or statements therein contained and placing its denial upon that ground, this Defendant denies each, every, all and singular the statements and allegations set forth therein.

II.

Answering Paragraphs 3, 4, 6 and 7 of said Fourth Claim, this Defendant having no informa-

tion or belief upon the subject matter mentioned in said paragraphs sufficient to enable it to answer any of the allegations contained therein, and placing its denial upon that ground, denies each, every, all and singular the statements and allegations set forth in said paragraphs.

III.

Answering Paragraph 5 of said Fourth Claim, this Defendant denies each, every, all and singular, generally and specifically, the statements and allegations set forth in said Paragraph 5.

For a further and separate and affirmative defense, this answering Defendant alleges as follows:

I.

That Defendant Joseph F. Blaylock is the owner in fee simple absolute of the property described in Paragraph 3 of the First Claim of this Amended Complaint, subject to the interest of this Defendant as set forth in Exhibit A attached hereto and made a part hereof.

II.

That Defendant Joseph F. Blaylock purchased said real property from Hyrum S. Sims, as evidenced by a deed dated July 9, 1956 and recorded in the Official Records of Siskiyou County in Book 371, Page 276 on July 10, 1956.

III.

That prior to the recordation of the instrument attached hereto and marked Exhibit A, this De-

fendant did deposit with the Siskiyou County Title Company the sum of Nine Thousand Dollars (\$9,000.00) together with its instructions that upon their determination that title to the subject property was in Joseph F. Blaylock and that they would furnish their policy of title insurance insuring this Defendant in said amount, subject only to the assignment to this Defendant, the usual printed exceptions of the title policy and taxes for the current year, that they could release the \$9,000.00, the amount of the title policy, to Joseph F. Blaylock; that such transaction and undertaking by this Defendant was made under the belief in good faith that said Joseph F. Blaylock did have the legal capacity to assign the said deed and that he was the legal owner of said property, which said reliance was based on the official records of the County of Siskiyou and the advice of the Siskiyou County Title Company; that this Defendant is informed and believes and therefore alleges that Defendant Joseph F. Blaylock and Defendant Hyrum S. Sims likewise believed that Joseph F. Blaylock was the owner of the subject property and that Hyrum S. Sims had legal authority to deed to Joseph F. Blaylock, and that Joseph F. Blaylock had legal authority to assign and transfer, as in Exhibit A set forth, and this Defendant is a bona fide mortgagee or transferee.

For a second, separate, further and affirmative defense this answering Defendant alleges as follows:

I.

Realleges as if fully set forth at this point Paragraph I of this Defendant's first affirmative defense.

II.

That Defendant Joseph F. Blaylock is the owner and possessed in fee simple absolute of such property subject to the rights of this Defendant by reason of Exhibit A attached hereto, by reason of the deeds recorded in the chain of title from this answering Defendant and Joseph F. Blaylock to the United States of America by virtue of its original patent issued on or about September 13, 1921.

III.

That if any discrepancy in the land intended to be conveyed by the United States of America in its original patent, and the land conveyed did or does now exist, such discrepancy has been known to the United States of America for the last five (5) years, and that the United States of America has made no attempt to alter, reform, reissue or otherwise correct the chain of title, as shown in the official records of the County Recorder of Siskiyou County, California, and that therefore said United States of America is guilty of laches, or should be estopped to assert such defect, or both.

Wherefore, this answering Defendant prays that Plaintiff take nothing by its Amended Complaint, and that title to the within described property be quieted in Defendant Joseph F. Blaylock, subject

to the rights of this answering Defendant by reason of Exhibit A, as to any claims of the United States of America, and for such other and further relief as to the Court may seem just and equitable.

HUBER & GOODWIN,

/s/ By NORMAN C. CISSNA,

Attorneys for Defendant Orleans
Veneer and Lumber Co.

Duly Verified.

EXHIBIT "A"

As security for the payment and the performance of all other terms and conditions of that certain Agreement dated 12/1/56 between Joseph F. Blaylock and Orleans Veneer and Lumber Co., a corporation, I, Joseph Blaylock, do hereby assign and transfer to Orleans Veneer and Lumber Co. all of my right, title and interest in and to that certain deed dated July 9, 1956 covering the following described property.

That real property situated in the County of Siskiyou, State of California, described as follows:

The northeast quarter of the northwest quarter; the east half of the east half of the northwest quarter of the northwest quarter; the northeast quarter of the northeast quarter of the southwest quarter of the northwest quarter; the north half of the north half of the southeast quarter of the northwest quarter in

Section 34, Township 13 North, Range 6 East,
Humboldt Meridian.

This assignment and transfer is not a sale, but is solely by way of security. In case of any default hereunder or of said Agreement, Orleans Veneer and Lumber Co., may enforce its rights under this assignment and transfer either as a pledgee, mortgagee or in any other manner permitted or provided by law. This assignment and transfer shall not be discharged or otherwise impaired by any extension of payment or renewal of said Agreement.

This assignment and transfer may be recorded at the option of Orleans Veneer and Lumber Co., and in the event it is so recorded, I agree to pay all recordation charges, including recordation of any reassignment or re-transfer of said deed to me. I shall pay all costs and expenses (including attorney's fees in a reasonable amount) to enforce this assignment and transfer in the event of default hereunder or under said agreement.

Dated: 12/1/56.

/s/ By Joseph F. Blaylock.

I hereby consent to the above assignment.

/s/ Vanda K. Blaylock,
Wife of Joseph F. Blaylock.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 20, 1957.

[Title of District Court and Cause.]

MEMORANDUM OPINION

Roche, Chief Judge:

The United States of America brings this action under 28 U.S.C. § 1345 (1952) against defendants Joseph Blaylock, Guy Head, and Orleans Veneer and Lumber Co., praying for: (1) a permanent injunction against Blaylock, restraining him from entry upon certain land in the Klamath National Forest and from logging the timber thereon; (2) a deed from Blaylock to plaintiff of this same land and judgment that the land belongs to plaintiff free of any liens; and (3) reformation of Homestead Patent No. 822,606 to contain a corrected legal description of the land patented under it.

The record discloses that, prior to 1921, John Patterson occupied certain land (hereafter called Parcel 1) in the Klamath National Forest, Siskiyou County, California, as a homestead under entry number 02655 and applied for a patent covering the land. On September 13, 1921, plaintiff issued to John Patterson Homestead Patent No. 822,606, which patent contained the following description intended by plaintiff to cover Parcel 1:

Northeast quarter of the northwest quarter, the east half of the east half of the northwest quarter of the northwest quarter, the north half of the north half of the southeast quarter of the northwest quarter and the northeast quarter of the northeast quarter of the south-

west quarter of the northwest quarter of Section thirty-four in Township thirteen north of Range six east of the Humboldt Meridian, California, containing sixty-two and fifty-hundredths acres.

The evidence shows that the description contained in Homestead Patent No. 822,606, because of mistake, did not cover Parcel 1 but instead covered another parcel of land in the Klamath National Forest owned by plaintiff (hereafter called Parcel 2).

The record shows that, in June 1943, a deed was executed between the Tax Collector of Siskiyou County and the State of California for purporting to transfer certain property to the State of California for non-payment of taxes. This deed contained the following description: "Homestead Entry #02-655 in NW $\frac{1}{4}$ Desig. Plat #4 Sec 34 Twp 13 R, 6E HM Ditch and Water Right." In January 1946, as a result of a tax sale, Hyrum S. Sims took a deed from the State of California with the following description: "H.E. #02665 Por. of NW $\frac{1}{4}$ (Ditch & Water Right) Section 34, Twp. 13 North, Range 6 East H.M." The evidence shows that Sims intended to buy Parcel 1.

In 1952, Sims had Albert Parrott, Siskiyou County Surveyor, make a survey of Parcel 1. According to that survey, Parcel 1 lies in sections 27 and 28, instead of section 34, Township 13 North, Range 6 East, Humboldt Meridian. The record shows the true description of Parcel 1 to be:

From the quarter corner common to sections 20 and 29, Township 13 North, Range 6 East,

Humboldt Meridian, South 66 degrees 09 Minutes east for 8,038.96 feet, thence east 1,650 feet, thence north 1,650 feet, thence west 1,650 feet and thence south 1,650 feet.

Upon learning of the mistaken description in his title, the record shows that Sims wrote to the Klamath Forest Supervisor on March 19, 1952 for advice about securing a proper legal description for Parcel 1. The Forest Supervisor, in a letter of July 23, 1952, recognized Sims' right to Parcel 1 where he was living, permitting him to cut timber on it and indicating that the Forest Supervisor would accept an amended patent description covering Parcel 1. Thereupon, Sims had Parcel 1 logged in 1953, 1955, and 1956. One of the men who logged in 1955 and 1956 was defendant Blaylock.

On July 9, 1956, the record shows, Sims conveyed his interest in Parcel 1 to Blaylock by quitclaim deed and also delivered to Blaylock a grant deed containing the description of Parcel 2. Plaintiff alleges that, when taking both deeds, Blaylock knew that any interest of Sims in Parcel 2 was subject to being divested by plaintiff.

The evidence shows that, in July 1956, Blaylock delivered to defendant Guy Head a deed of trust containing the description of Parcel 2 as security for Guy Head's co-signing a note with Blaylock. That deed of trust has not been recorded. The record further discloses that, on December 1, 1956, Blaylock delivered to defendant Orleans Veneer and Lumber Co. an instrument purporting to assign his interest in the grant deed covering Parcel

2. Plaintiff alleges that this instrument did not pass any legal interest in Parcel 2 to Orleans Veneer and Lumber Co. Plaintiff further alleges that, when receiving the instrument, Orleans Veneer and Lumber Co. knew or should have known that any interest of Blaylock in Parcel 2 was subject to being divested by plaintiff.

Since Blaylock claims to own Parcel 2 and has cut timber on it, plaintiff sought and received a preliminary injunction restraining Blaylock from cutting or removing timber on Parcel 2. It is this injunction which plaintiff seeks to have made permanent.

The record discloses that plaintiff has a right to reformation of the patent and subsequent documents of title. Blaylock's first defense is that his purchase of Parcel 2 from Sims, in good faith, for value, and without notice, extinguished plaintiff's right of reformation. However, the evidence shows that Blaylock knew of Sims' arrangement with the Forest Service under which Sims could log Parcel 1 in spite of documents of title showing him to be the owner of Parcel 2. Sims had given Blaylock a copy of Parrott's survey map, which show both the "location of Patterson patent and H. S. Sims as occupied previous to homestead application of 1921 and continuous to date" (Parcel 1) and the "location of Patterson patent as per records 62.5 acres" (Parcel 2). Sims had also told Blaylock that Blaylock would not have any right to timber on Parcel 2. Therefore, Blaylock was not a bona fide pur-

chaser when he took a grant deed from Sims to Parcel 2.

Blaylock's second defense is that plaintiff's right of reformation had been extinguished before Blaylock bought from Sims. Blaylock contends that the transfer of Parcel 2 to the State of California in 1943 for unpaid taxes and Sims' purchase of Parcel 2 at a tax sale in 1946 were both bona fide purchases cutting off plaintiff's equity of reformation. The record discloses that the United States has always been in possession of Parcel 2. The United States had a right against Patterson to reform the patent to show that the United States was the real owner of Parcel 2. This right cannot be cut off by State taxing power. The State of California never had jurisdiction to tax Parcel 2. Defects in tax titles and tax deeds fall into two categories, procedural and jurisdictional. A state may enact statutes declaring that a tax deed is conclusive evidence of title so far as procedural defects are concerned, but such statutes cannot relieve jurisdictional defects inasmuch as that would constitute an unconstitutional confiscation of property. *Miller vs. McKenna*, 23 C. 2d 774, 147 P. 2d 531 (1944); accord, *Sheeter vs. Lifur*, 113 C.A. 2d 729, 249 P. 2d 336 (1952).

Blaylock's third defense is that plaintiff should be denied its relief on the equitable ground of laches. The ordinary defense of laches is not available against the United States. The United States holds its lands in trust for the people. Officers or employees of the United States who have no au-

thority to dispose of United States property cannot by their conduct cause the United States to lose its valuable rights in such property by their acquiescence or failure to act. *United States vs. California*, 332 U.S. 19, 40 (1946).

Plaintiff's right of reformation cannot be extinguished by transfer of a title acquired by the State of California for unpaid taxes on land which was never within the State of California's taxing jurisdiction. See *Miller vs. McKenna*, 23 C. 2d 774, 147 P. 2d 531 (1944). Accordingly, the court finds no merit in the defense of Orleans Veneer and Lumber Co. Orleans Veneer and Lumber Co. cannot acquire rights in Parcel 2 superior to those of plaintiff because the origin of Orleans Veneer and Lumber Co.'s claim is a tax deed defective for want of taxing jurisdiction. Cf. *Gaspard vs. Edward M. LeBaron, Inc.*, 107 C.A. 2d 356, 237 P. 2d 278 (1951).

Plaintiff's prayer for:

(1) a permanant injunction against Blaylock, restraining him from entering upon and logging the timber on Parcel 2; and

(2) a deed from Blaylock to plaintiff of Parcel 2 and judgment that Parcel 2 belongs to plaintiff free of any liens; and

(3) reformation of Homestead Patent No. 822,606 to contain a corrected legal description of Parcel 1

Is Hereby Granted.

Plaintiff's prayer for alternative relief against

defendants Hyrum S. Sims, Edward E. Head, John H. Stevens, Harold Leever, and Iris Leever
Is Hereby Denied.

Plaintiff shall prepare findings of fact, and conclusions of law in accordance with this opinion.

Date: March 4th, 1958.

/s/ MICHAEL J. ROCHE,
United States District Judge.

[Endorsed]: Filed March 4, 1958.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on December 2, 1957, before the Honorable Michael J. Roche, Chief Judge, presiding without a jury. Plaintiff appeared through its attorneys, Lloyd H. Burke, United States Attorney for the Northern District of California, and Bernard Petrie, Assistant United States Attorney for that District; defendant Joseph F. Blaylock appeared personally and through his attorney, Michael T. Hennessey; defendant Orleans Veneer and Lumber Co., a corporation, appeared through its attorneys, Huber and Goodwin represented by Norman C. Cissna; defendant Edward E. Head, doing business as the Head Lumber Company, appeared personally and through his attorney, William L. Ferdon; defendant John H. Stevens appeared personally and

through his attorney, Samuel R. Friedman; defendants Hyrum S. Sims and Guy Head defaulted; and defendants Harold Leever and Iris Leever, a partnership, doing business as Willamette Builders Supply, were not served with the complaint and summons.

Oral and documentary evidence was introduced by and on behalf of the respective parties, and oral argument was made by their attorneys at the conclusion of the trial. Thereafter, memoranda were submitted to the Court, and the cause was submitted on January 10, 1958.

The Court, being fully advised in the premises, made and entered an order on March 4, 1958, granting judgment for plaintiff upon its first claim denying plaintiff's alternative claims 2 through 5 and directing the preparation of the following:

Findings of Fact

1. This action was brought under 28 U.S.C. § 1345.

2. Prior to 1921 John Patterson occupied certain land (hereinafter called parcel 1) in the Klamath National Forest, Siskiyou County, California, as a homestead under number 02665 and applied for a patent for such land.

3. On September 13, 1921, plaintiff issued to John Patterson Homestead Patent number 822,606 which patent contained the following description intended by plaintiff, and believed by John Patterson, to cover parcel 1:

“Northeast quarter of the Northwest quarter,

the East half of the East half of the Northwest quarter of the Northwest quarter, the North half of the North half of the Southeast quarter of the Northwest quarter and the Northeast quarter of the Northeast quarter of the Southwest quarter of the Northwest quarter of Section 34 in Township 13 North of Range 6 East of the Humboldt Meridian, California, containing 62.50 acres."

4. The description contained in Homestead Patent number 822,606, because of mistake, did not cover parcel 1 but instead covered another parcel of land in the Klamath National Forest owned by plaintiff (hereinafter called parcel 2).

5. The true description of parcel 1 is as follows:

"From the quarter corner common to Section 20 and 29, Township 13 North, Range 6 East, Humboldt Meridian, South 66°09' East from 8,038.96 feet, thence East 1,650 feet, thence North 1,650 feet, thence West 1,650 feet, and thence South 1,650 feet."

6. Plaintiff has always been in possession of parcel 2, which parcel is virgin timber land.

7. In June, 1943, a deed was executed between the Tax Collector of Siskiyou County and the State of California which deed purported to transfer certain property to the State of California for non-payment of taxes and which deed contained the following description: "Homestead Entry #02655 in NW $\frac{1}{4}$ Desig. Plat #4 Sec 34 Twp 13N R 6E HM Ditch and Water Right".

8. In January, 1946, defendant Sims as a result

of a tax sale took a deed from the State of California with the following description: "H. E. #02655 Por. of NW $\frac{1}{4}$ (Ditch & Water Right) Section 34, Twp. 13 North, Range 6 East HM". Defendant Sims intended to buy parcel 1.

9. Thereafter defendant Sims actually occupied parcel 1; he never occupied parcel 2.

10. In 1952 defendant Sims had Albert Parrott, Surveyor for Siskiyou County, make a survey of parcel 1. According to that survey, parcel 1 lies in sections 27 and 28, instead of section 34, Township 13 North, Range 6 East, Humboldt Meridian.

11. Upon learning of the mistaken description in his documents of title, defendant Sims wrote to the Klamath Forest Supervisor on March 19, 1952, asking for advice about securing a proper legal description for parcel 1. The Klamath Forest Supervisor wrote to defendant Sims on July 23, 1952, recognizing Sims' rights to parcel 1, where Sims was living, permitting Sims to log timber from parcel 1 and stating that the Klamath Forest Supervisor would accept an amended patent description for parcel 1.

12. Thereafter in 1953, 1955 and 1956 defendant Sims caused parcel 1 to be logged. One of the men who logged parcel 1 in 1955 and 1956 was defendant Blaylock.

13. In July, 1956, defendant Sims conveyed his interest in parcel 1 to defendant Blaylock by quitclaim deed and also delivered to defendant Blaylock a grant deed containing the description contained in Homestead Patent number 822,606.

14. Prior to and when taking the two deeds from defendant Sims, defendant Blaylock knew of Sims' arrangement with the Forest Service under which Sims could log parcel 1 although he had documents of title for parcel 2 and not parcel 1. Before the transfer from Sims to Blaylock, Sims had given to Blaylock a copy of Parrott's survey map, which showed both the "location of Patterson patent and H. S. Sims as occupied previous to homestead patent and continuous to date" (parcel 1) and the "location of Patterson patent as per records 62.5 acres" (parcel 2). Also Sims had told Blaylock that Blaylock would not have any right to the timber on parcel 2.

15. In July, 1956, defendant Blaylock delivered to defendant Guy Head a deed of trust containing the description in Homestead Patent number 822,-606. That deed of trust has not been recorded while plaintiff did record a notice of the pendency of this suit.

16. On December 1, 1956, defendant Blaylock delivered to defendant Orleans Vencer and Lumber Co. an instrument purporting to assign his interest in the grant deed taken from defendant Sims.

17. Defendant Blaylock claimed ownership of, threatened to log and did start to log timber on parcel 2.

Conclusions of Law

1. This Court has jurisdiction of the subject matter and the parties under 28 U.S.C. § 1345.

2. Plaintiff was and is the owner of parcel 2, the description of which is as follows:

“Northeast quarter of the Northwest quarter, the East half of the East half of the Northwest quarter of the Northwest quarter, the North half of the North half of the Southeast quarter of the Northwest quarter and the Northeast quarter of the Northeast quarter of the Southwest quarter of the Northwest quarter of Section 34 in Township 13 North of Range 6 East of the Humboldt Meridian, California, containing 62.50 acres.”

3. Plaintiff is entitled to the reformation of Homestead Patent number 822,606 and subsequent documents of title to describe the land actually entered and occupied thereunder by John Patterson (parcel 1). The correct description of such land is:

“From the quarter corner common to Sections 20 and 29, Township 13 North, Range 6 East, H.M., South $60^{\circ} 09'$ E. for 8,038.96 feet, thence East 1,650 feet, thence North 1,650 feet, thence West 1,650 feet, thence South 1,650 feet.”

4. The State of California never had any jurisdiction to tax parcel 2. Neither the attempted transfer of parcel 2 to the State of California in 1943 for unpaid taxes nor Sims' taking of a deed covering parcel 2 at a tax sale in 1946 cut off plaintiff's equity of reformation.

5. Defendant Blaylock was not a bona fide purchaser when he took the grant deed covering parcel 2 from defendant Sims.

6. Defendant Orleans Veneer and Lumber Co., because it took merely an assignment from defendant Blaylock, did not secure any rights superior to

those of Blaylock. Furthermore, Blaylock's transfer to Orleans did not enable Orleans to cut off plaintiff's right of reformation because the origin of Orleans' claim is a tax deed defective for want of taxing jurisdiction.

7. By taking the deed of trust from defendant Blaylock, defendant Guy Head did not cut off plaintiff's equity of reformation because Guy Head did not record his deed while plaintiff did record a notice of the pendency of this suit.

8. The defense of laches may not be asserted against plaintiff.

Let judgment be entered accordingly.

Dated: March 27th, 1958.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Certificate of Mailing attached.

[Endorsed]: Filed March 27, 1958.

In the United States District Court, Northern District of California, Southern Division

Civil No. 36569

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOSEPH F. BLAYLOCK; GUY HEAD; ORLEANS VENEER and LUMBER CO., a corporation; HYRUM S. SIMS; EDWARD E. HEAD, doing business as HEAD LUMBER COMPANY and as SISKIYOU MILLS, a partnership; JOHN H. STEVENS; and HAROLD LEEVERS and IRIS LEEVERS, a partnership, doing business as WILLAMETTE BUILDERS SUPPLY,

Defendants.

JUDGMENT

Findings of Fact and Conclusions of Law having been filed in this cause,

Wherefore, by reason of the law, the pleadings, and the premises contained in those Findings and Conclusions,

It Is Hereby Ordered, Adjudged and Decreed that:

1. Defendant Blaylock and his agents be restrained from entering upon and logging, cutting or defacing the timber on land described as follows:

Northeast quarter of the northwest quarter,
the east half of the east half of the northwest

quarter of the northwest quarter, the north half of the north half of the southeast quarter of the northwest quarter and the northeast quarter of the northeast quarter of the southwest quarter of the northwest quarter of Section thirty-four in Township thirteen north of Range six east of the Humboldt Meridian, California, containing sixty-two and fifty-hundredths acres.

2. Defendant Blaylock shall deliver to plaintiff within 10 days a deed covering such land.

3. Homestead Patent number 822,606 and subsequent documents of title be hereby reformed to contain the following description as the correct description of the land homesteaded and patented:

From the quarter corner common to sections 20 and 29, Township 13 North, Range 6 East, Humboldt Meridian, South 66 degrees 09 minutes east for 8,038.96 feet, thence east 1,650 feet, thence north 1,650 feet, thence west 1,650 feet and thence south 1,650 feet.

4. Plaintiff is the owner of the land described in subparagraph (1) hereof free of any liens whatever, including but not limited to, any claims of defendants Blaylock, Orleans Veneer and Lumber Co. and/or Guy Head.

5. Plaintiff take nothing by its complaint from defendants Hyrum S. Sims, Edward E. Head, John H. Stevens or Harold and Iris Leever.

It Is Further Ordered, Adjudged and Decreed that plaintiff do have and recover from defendants Blaylock and Orleans Veneer and Lumber

Co., jointly and severally, its costs of suit in the amount of \$359.51, to be taxed by the Clerk of this Court and paid for forthwith by such defendants.

Dated March 27th, 1958.

/s/ MICHAEL J. ROCHE,
United States District Judge.

Entered in Civil Docket March 28, 1958.

Certificate of Mailing attached.

[Endorsed]: Filed March 27, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court:

You will please take notice that Joseph F. Blaylock, one of the defendants in the above entitled action hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the judgment of the above entitled court entered March 28, 1958 which affects the said defendant Joseph F. Blaylock as follows: Paragraphs 1, 2, 3 and 4 of such judgment together with that portion of such judgment which awards costs of suit against defendant Joseph F. Blaylock.

Dated this 16 day of May, 1958.

BURTON & HENNESSY,
/s/ By MICHAEL T. HENNESSY,

Attorneys for Defendant Joseph F.
Blaylock.

[Endorsed]: Filed May 19, 1958.

[Title of District Court and Cause.]

BOND ON APPEAL

Know All Men By These Presents: That we, Joseph F. Blaylock as principal and Donald D. Tilley as surety are held and firmly bound to the United States of America in the sum of Two Hundred and Fifty Dollars lawful money of the United States to be paid to the United States of America; for which payment shall be made in the event that the above entitled court or the United States Circuit Court of Appeals for the Ninth Circuit shall order recovery of costs on the appeal taken in the above action by Joseph F. Blaylock; and that said persons for himself, his heirs, executors and administrators, jointly and severally agree to be held by this bond.

Now, Therefore, if the above entitled Court or the United States Court of Appeals for the Ninth Circuit shall award costs on appeal to the United States, such parties shall be obligated under this bond to pay such sum not exceeding the sum of Two Hundred and Fifty Dollars, but if such courts shall not order the payment of such costs after the conclusion of this appeal this bond shall become void.

/s/ JOSEPH F. BLAYLOCK,
Principal,

/s/ DONALD D. TILLEY,
Surety.

State of California,
County of Siskiyou—ss.

Donald D. Tilley being first duly sworn deposes and says:

That he is the surety named in the above bond and that he is a freeholder and resident of the State of California and has a net worth in excess of the sum of Ten Thousand Dollars, over and above all his just debts and liabilities, exclusive of property exempt from execution; that further said person is the owner of real property with reasonable market value in excess of Six Thousand Dollars.

/s/ DONALD D. TILLEY

Subscribed and sworn to before me this 15 day of May, 1958.

[Seal] /s/ MICHAEL T. HENNESSY,
Notary Public in and for the County of Siskiyou,
State of California.

[Endorsed]: Filed May 19, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Orleans Veneer and Lumber Co., a corporation, one of the Defendants above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this action

on March 28, 1958 which effects the said Defendant Orleans Veneer and Lumber Co., a corporation, as follows: Paragraphs 1, 2, 3 and 4 of such judgment, together with that portion of such judgment which awards costs of suit against Defendant Orleans Veneer and Lumber Co.

Dated: This 23 day of May, 1958.

HUBER & GOODWIN,
/s/ By NORMAN C. CISSNA,

Attorneys for Appellant Orleans
Veneer and Lumber Co.

[Endorsed]: Filed May 27, 1958.

[Title of District Court and Cause.]

POINTS ON APPEAL

Pursuant to Rule 75 (d) defendant-appellant Orleans Veneer and Lumber Co. intends to rely upon the following points on appeal.

(a) That the State of California was a bona fide purchaser for value of the land sought to be reformed and therefore any subsequent sale by the State of California cuts off the United States' right to reformation.

(b) That the purchase by H. S. Sims from the State of California of the patent sought to be reformed was a sale to a bona fide purchaser for value and therefore cut off the equities of the United States to the right of reformation.

(c) That the State of California has a right to rely on the regularity of patents issued by the United States and does have a right and jurisdiction to tax lands covered by patents issued by the United States.

(d) That a tax sale regularly held pursuant to California law eliminates all equities of all predecessors in interest to the defaulting tax payer and all lien holders of the defaulting tax payer including the right of the United States to procure a reformation of the original patent.

(e) That Orleans Veneer and Lumber Co. is a bona fide mortgagee protected by the recording laws of the State of California.

(f) That if the United States government has a right of reformation, it is subject to California Civil Code Section 3399, and reformation may not prejudice the rights acquired by a third party, in good faith and for value. That Orleans Veneer and Lumber Co. is the holder of rights acquired in good faith and for value.

Dated: This 9th day of June, 1958.

HUBER & GOODWIN,
/s/ By NORMAN C. CISSNA,

Attorneys for Defendant-Appellant
Orleans Veneer and Lumber Co.

[Endorsed]: Filed June 10, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein as designated by Counsel:

Excerpts from Docket Entries.

Complaint.

Affidavit of Henry Erhart.

Order to Show Cause and Temporary Restraining Order.

Stipulation and Order Amplifying Restraining Order.

Answer of Joseph F. Blaylock.

Order Granting Continuance of Temporary Restraining Order.

Consent to Filed Amended Complaint.

Amended Complaint.

Answer of Joseph F. Blaylock to Amended Complaint.

Answer of Orleans Veneer and Lumber Co. to Amended Complaint.

Proposed Findings and Conclusions by Joseph F. Blaylock.

Order Granting Preliminary Injunction, Findings of Fact and Conclusions of Law.

Memorandum Opinion of Court.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal of Joseph F. Blaylock.

Appeal Bond of Joseph F. Blaylock.

Designation of Record on Appeal by Joseph F. Blaylock.

Notice of Appeal by Orleans Veneer and Lumber Co.

Appeal Bond of Orleans Veneer and Lumber Co.

Points of Orleans Veneer and Lumber Co. in Appeal.

Appellee's Designation of Record on Appeal.

Reporter's Transcript of Proceedings.

Plaintiff's Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11-A, 11-B, 11-C, 11-D, 12, 13, 13-A, 14, and 15.

Defendants' Exhibits A, B, C-1, C-2, C-3, C-4, D-1, D-2, E-1, E-2, E-3, E-4, F, G, H, I, J, K, L, M, N, and O.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 8th day of July, 1958.

[Seal]

C. W. CALBREATH,
Clerk,

/s/ By MARGARET P. BLAIR,
Deputy Clerk.

[Title of District Court and Cause.]

PROCEEDINGS OF TRIAL

December 2, 3, 4, 1957

Before: Hon. Michael J. Roche, Judge.

Appearances: For the Government: Lloyd H. Burke, U. S. Attorney, by Bernard Petrie, Asst.

U. S. Attorney. For Defendant Blaylock: Burton, Lee & Hennessy, by Michael T. Hennessy, Esq. For Defendant Stevens: Samuel R. Friedman, Esq. For Defendant Orleans Veneer & Lumber Co.: Huber & Goodwin, by Norman Cissna, Esq. For Defendant Head: William L. Ferdon, Esq. [1*]

* * * * *

Mr. Hennessy: May we also stipulate at this time that in regard to Exhibits No. 2 and No. 3, that is the conveyance of real estate in Section 34 to the State of California, and the conveyance of right by the State of California to Hyrum Sims (Figure 1) that the taxing procedures were regular, and (2) [10] that the State of California had no knowledge at either time of any misdescription of any patent.

Mr. Petrie: So stipulated, Your Honor. [11]

* * * * *

FREDERICK P. WILDER

Called as a witness by the Government, being first duly sworn, was thereupon examined and testified as follows:

* * * * *

Direct Examination

Q. (By Mr. Petrie): How long have you been employed by the Forest Service, Mr. Wilder?

A. Since 1929.

Q. What were the places of your employment?

A. All in the Klamath National Forest, at Or-

* Page numbers appearing at top of page of Reporter's Transcript of Record.

(Testimony of Frederick P. Wilder.)

leans and Yreka District with headquarters at Oak Knoll and at Happy Camp.

Q. How long have you lived in the Klamath River area? A. Born there.

Q. You have lived there all your life?

A. Practically, except for eight or ten years.

Q. Did you ever know John Patterson? [39]

A. Yes; not very well, but he was well known in the area.

Q. Did you know any of his family?

A. Yes, I knew the boys quite well, used to play ball against them and with them.

Q. How many boys were there?

A. There were two that I remember.

Q. What are their names, if you remember?

A. Well, Johnny, and I don't know if I remember the other boy; he was younger. I think it was Louie, but I am not sure.

Q. Do you know where the family lived?

A. Yes.

Q. Where did they live?

A. They lived on this homestead up from the river road, had to go there by trail.

Q. Did you ever visit that homestead when the Patterson family was living there?

A. Yes, I have.

Q. In what year or years, as best you can place it now?

A. It was after I went to work for the Forest Service in 1929.

Q. When was that?

A. In 1929. But I don't remember what par-

(Testimony of Frederick P. Wilder.)

ticular times. The trail through their homestead gave access to the back country, the primitive area. That was a regular Forest Service trail.

Q. How many times were you on the old Patterson property? [40]

A. I couldn't say, possibly a half dozen times I have been through there.

Q. Do you know Hyrum S. Sims?

A. Yes.

Q. Was there ever a time, to your knowledge, that Mr. Sims was living in this area?

A. Oh, yes.

Q. What land did he occupy?

A. What we called the Patterson place.

Q. Did Mr. Sims occupy the same property that was occupied by John Patterson and his family?

A. That's right.

Q. Did you visit the property while Mr. Sims was living there? A. Yes.

Q. How many times?

A. Oh, I couldn't say exactly; several times, and usually in the course of official duty.

Mr. Petrie: No further questions. [41]

* * * * *

HYRUM SMITH SIMS

Called as a witness by the Government, being first duly sworn, testified as follows: [45]

* * * * *

Direct Examination * * * * *

Q. (By Mr. Petrie): Did you at one time live in Northern California off the Klamath River?

(Testimony of Hyrum Smith Sims.)

A. Yes, sir, I did.

Q. When was that, Mr. Sims?

A. I moved there in 1946.

Q. How did you acquire the property upon which you lived there?

A. I bought it from a tax sale.

Q. Do you remember the price that you paid for the property? A. \$450.00.

Q. Did you buy that property in 1946?

A. Yes, sir, that is—it was '47 at the time I got it, advertised, and the tax sale came up.

Q. Before you bought the property, Mr. Sims, did you inspect the property that you were going to buy? A. Yes, I did.

Q. Did the place that you bought have a name, or was it just a piece of property?

A. Well, it's called the Patterson place.

Q. For how long did you live on that property?

A. I will have to think.

Q. Perhaps I can put the question this way, Mr. Sims: You have sold that property, have you not? [47] A. Yes, I have.

Q. When did you sell it?

A. In July, 1956.

Q. Did you live on the property continually while you held it?

A. No, I didn't, I didn't move up there until about '51, I guess.

Q. Where were you living before 1951?

A. John Skimball's (?) place down on the river.

(Testimony of Hyrum Smith Sims.)

Q. How far is that from the old Patterson place? A. About five miles.

Q. And then you moved to the Patterson place in 1951, is that correct? A. That's correct.

Q. Did you live there then continually until you sold it in 1956?

A. Only when I was to the hospital, yes.

Q. What buildings were on the property when you bought it? A. The log house.

Q. Were there any other buildings?

A. There were some sheds I had to burn down.

Q. Of what did the log house consist?

A. Well, at that time, two rooms upstairs, attic.

Q. Were there any other buildings on the property?

A. I told you, the shed I had to burn down.

Q. Just those. Was there any clearing on the property?

A. Yes, meadow, about five acres, I would judge.

Q. Did you make any improvements on the buildings? A. Yes, I did.

Q. What did you do, Mr. Sims?

A. Well, for example, we had to rebuild the whole thing. I put in new floors, and we had to put in a partition, and plaster board, or whatever you call it, in the bedroom, and we put in knotty pine in the living room, and we built a kitchen and toilet and hallway on it extra.

Q. Did you put up any other buildings on the property? A. Yes, we did.

Q. What did you put up?

(Testimony of Hyrum Smith Sims.)

A. There was a double garage, or, rather, garage and a bulldozer shed, and wash house, and a chicken coop and chicken run.

Q. Did there come a time in 1952 or before that when you decided to log the property?

A. Yes, there did.

Q. Did there come a time when you hired Mr. Perry, the County Surveyor, Siskiyou County, to survey the property for you?

A. That is right.

Q. When was that, Mr. Sims?

A. It must have been '52, maybe '53, I guess.

Q. Well, when Mr. Parrott made that survey for you what information did he give you? [49]

A. Well, he just surveyed to the first corner and said that I wasn't on the property that I had the deed for.

Q. And did you, after getting that information, write a letter to the Forest Service about it?

A. I did. [50]

* * * * *

Q. At the time you were talking to Mr. Blaylock you had these three letters from the Forest Service in your possession, did you not?

A. I'm not right sure. Now, I didn't have them right then at the first time.

Q. You mean the first time that you talked to Mr. Blaylock about them?

A. No, Mr. Stevens had them.

Q. Well, at any time during your negotiations

(Testimony of Hyrum Smith Sims.)

with Mr. Blaylock did you have those letters in your possession?

A. Yes. I got them before he bought.

Q. Pardon?

A. I got them before he bought it.

The Court: Do I understand the originals of these letters are available? [67]

A. Yes, sir.

The Court: Where are they?

A. Meadow Vista, my home.

The Court: Will you have any difficulty in producing them at the proper time?

A. Well, no, if I could send someone up there.

The Court: Well, just so they are available, that's all I want to know now.

Mr. Petrie: Did your Honor ask about the original deed to Mr. Sims?

The Court: The letters.

Mr. Petrie: Oh, the letters. I don't think there will be any dispute about the language of the letters, your Honor.

The Court: Very well, proceed.

Mr. Petrie: Q. Did you ever show those three letters, or any of them, to Mr. Blaylock?

A. Yes, I did.

Q. Did you show some or all of them to him?

A. All of them.

Q. And that was before he bought the property from you, is that right?

(Testimony of Hyrum Smith Sims.)

A. Before it was paid. Not when he got the option but before it was paid for.

Q. Before you closed the deal?

A. Yes. [68]

* * * * *

Q. Now, when Mr. Parrott made the survey, Mr. Sims, did he give you a map of the survey?

A. Yes, he did.

Q. Did you at any time give that map to Mr. Blaylock? A. Yes, I did.

Q. When did you do that, sir? Was that before or after the transaction was closed?

A. Before he bought it. [69]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Hennessy): Now, Mr. Sims, going back, first of all, to 1946, I believe you say that was when you acquired the property, acquired Section 34?

A. I am not positive if I acquired it then, or that I advertised it.

Q. I see.

A. Whether it was in '47——

It might have been '47 when I finally got it. [74]

Q. Well, in any event, did you ask for this property to be up for sale, or did you——

A. That's right.

Q. And so you asked that this property in Section 34 be put up for sale?

A. That is right.

Q. And the property you bought, the legally ad-

(Testimony of Hyrum Smith Sims.)

vertised property, was the property in Section 34, wasn't it?

A. Well, it's the deed I got.

Q. That's the deed you got. And no one from the tax office—no representative of the State of California—went out on the land with you, did they?

A. No, they didn't. [75]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Ferdon): Well, Mr. Sims, isn't it correct that in all your dealings with the Government you referred to 27 and 28 as your place, the place you developed, "My place", isn't that right?

A. No, I don't think so. That's the only one I had done any work on at all.

Q. You wrote to them, did you not, as the letter states in Plaintiff's Exhibit D:

"About five years ago I obtained a parcel of land amounting to 62½ acres in the Klamath Forest. This was through a tax sale by Siskiyou County. The land was advertised according to law, and sold to me as the highest bidder. Since then I have resided continually on same and have made my home there. This land was homesteaded by John Patterson in 1921 and lies in Section 34, Township 13 North—R 6 E, Siskiyou County."

So you always referred, did you not, in the dealings to the land on which you resided, isn't that correct?

A. That's correct, until I had to get a deed in order to sell it.

(Testimony of Hyrum Smith Sims.)

Q. And, Mr. Sims, you never resided at any time on Section 34, did you?

A. No, I did not. [86]

* * * * *

JOSEPH FRANCIS BLAYLOCK

called as a witness under the Federal Rule of Civil Procedure 43b, first having been duly sworn, testified as follows:

* * * * *

Direct Examination

Mr. Petrie: Q. How long have you been a logger, [145] Mr. Blaylock?

A. For the last four years.

Q. From 1953 to 1957?

A. I think it was in 1953 that I first started logging.

Q. What was your occupation from 1951 to 1953 in Happy Camp?

A. Falling and bucking timber, contracting.

* * * * * [146]

Q. Now, where were you standing when you had this discussion with Mr. Sims with reference to the land that Mr. Sims was occupying? Were you near the house, were you on one of the borders; where were you on the land?

A. I would say that we were approximately middle ways of the land and close to the east border of the land.

Q. Close to the east border of the land?

A. Yes, sir.

(Testimony of Joseph Francis Blaylock.)

Q. And you said you were looking out on the Forest Service timber at the time that you made these remarks to Mr. Sims, is that correct?

A. That is correct.

Q. Were you looking at any particular direction? Were you looking east or were you looking south?

A. It would be east that I was looking.

Q. You were looking east? [152]

A. Yes, sir.

Q. And as far as you could see and as far as you knew, that was all Forest Service timber, isn't that so?

A. Yes, sir, that is true. [153]

* * * * *

Q. What kind of a land did you find when you made your inspection?

A. Well, I found it to be the same general terrain in the area of Happy Camp. It was timbered and had ravines.

Q. Was it heavily timbered?

A. Portions of it were heavily timbered and some of it weren't so heavy.

Q. Did you estimate how much timber there was on the land?

A. No, sir, I didn't at that time because I didn't cover enough of it or walk through enough of it that I figured I could get a very accurate estimation of it.

Q. Did you notice what kind of timber was on it?

(Testimony of Joseph Francis Blaylock.)

A. Yes, sir, I noticed mostly Douglas fir.

Q. And some pine? [158]

A. Pine, and there was some firs.

Q. Did you see any buildings on that land?

A. No, sir, I did not.

Q. Did you see any evidence of cultivation at all?

A. No, sir, I did not.

Q. Did you see any notice of a mining claim posted?

A. No, sir. [159]

* * * * *

Mr. Petri: Q. Mr. Blaylock, did there come a time in December of 1956 when you got some money from the Orleans Veneer and Lumber Company?

A. There did.

Q. When did you start your negotiations with the company to get that money?

A. I think that was in the early part of October.

Q. What representative of the company did you see? [186]

A. I contacted Mr. Gene Young.

Q. Who is he?

A. As far as I know, he is the timber cruiser for the Orleans Veneer Lumber Company.

Q. Where did you contact him?

A. I contacted him at Orleans.

Q. Did you go with him to inspect the land in Section 34?

A. No, sir, I did not.

Q. Did you tell him about the land in Section 34?

A. Yes, sir, I did.

Q. And what was the purpose of your contacting him?

(Testimony of Joseph Francis Blaylock.)

A. I wanted to give them a consignment.

Q. Of what?

A. On the timber in Section 34 that I had purchased from Mr. Sims.

Q. And did you eventually give them a consignment of the timber?

A. Yes, sir, I did.

Q. When did you do that?

A. That was in the early part of December, it was.

Q. And did you, before you gave him that consignment, enter into an agreement with the Orleans Veneer and Lumber Company to deliver logs to that company?

A. At the time I gave him a consignment on it, we entered into an agreement, yes, sir. [187]

Q. Did you enter into an agreement at the time you gave him the consignment or before you gave him the consignment?

A. At the time I gave him that consignment.

Mr. Petrie: I ask that this agreement, your Honor, be marked Plaintiff's Exhibit No. 15 for identification.

The Clerk: Exhibit 15 marked for identification.

(The agreement was received and marked Plaintiff's Exhibit 15 for identification.)

Mr. Petrie: Q. Mr. Blaylock, I show you Plaintiff's Exhibit 15 for identification and ask you if that isn't your copy of the agreement you entered into with the Orleans Company? Isn't that the document that you identified at your deposition, Mr.

(Testimony of Joseph Francis Blaylock.)

Blaylock, and that was marked Plaintiff's Exhibit 6 and attached to your deposition?

A. That is the agreement that—that is your copy of the agreement.

Q. That is a copy of the agreement you executed with the company, is it not? A. Yes, sir.

Q. What was the substance of that agreement, Mr. Blaylock? How much money were you to get from the company? A. \$9,000.

Q. Did you get \$9,000 from the company?

A. Yes, sir, I did. [188]

Q. And in return, what was your agreement?

A. I was to deliver them any and all merchantable timber in land Section 34.

Q. For what price?

A. Forty dollars per thousand.

Q. Delivered at Orleans?

A. Delivered at Orleans.

Q. Now, in addition to your contact with Mr. Gene Young, did you have any contact with anyone else representing the Orleans Company?

A. Yes, sir, I did.

Q. With whom? A. Mr. Bill Strauser.

Q. And that is the Mr. Strauser that is in the courtroom? A. Yes, it is.

Q. And Mr. Young is also in the courtroom?

A. Yes, sir.

Q. Where did you meet with Mr. Strauser?

A. At the Arcata Plywood Corporation in——

Q. In Arcata?

A. In Arcata, California, yes, sir.

(Testimony of Joseph Francis Blaylock.)

Q. And did Mr. Strauser ask you for some evidence of your ownership of that timber?

A. He did.

Q. And what evidence did you give to him?

A. My deed to cover the property and title insurance.

Q. By "deed" you mean the deed you got from Mr. Sims? A. Yes, sir.

Q. Did you show any other evidence to Mr. Strauser?

A. That is all the evidence of ownership I had to show.

Q. I believe you said at the same time that you executed a consignment on it or an assignment. What was the purpose of that consignment or assignment, Mr. Blaylock?

A. To make payments on my monthly obligation and carry me through the winter months.

Q. That was a security instrument, was it not?

A. I don't understand.

Q. Mr. Blaylock, I show you Plaintiff's Exhibit 8 which purports to be an assignment from you to the Orleans Veneer Lumber Company. Is that a copy of the assignment that you gave the company as security for the repayment of the \$9,000?

A. Yes, sir, it is.

Q. It is? And did you intend by this assignment to give security interest in the timber and the land or just in the timber on the land?

A. Just in the timber.

Q. Now, Mr. Blaylock, after you got the letter

(Testimony of Joseph Francis Blaylock.)
from Mr. Sims in the spring of this year and took it to your counsel, when did you next see Mr. Sims?

A. The day we came down here for the hearings, for the preliminary [190] injunction.

Q. Did you have any contact by phone with him in the meantime?

A. No, sir, I didn't. [191]

* * * * *

CHARLES E. YOUNG

called as a witness on behalf of Defendant Orleans Veneer & Lumber Company, being first duly sworn, testified as follows:

The Court: What is your full name, please?

The Witness: Charles Eugene Young.

The Court: Charles, you sit right down there and remember that the reporter must take down what you say.

The Witness: I don't hear very well.

The Court: That's all right. Your full name now is what?

The Witness: Charles Eugene Young.

The Court: Y-o-u-n-g?

The Witness: Yes, sir.

The Court: Where do you live?

The Witness: Orleans, California.

The Court: Where?

The Witness: Orleans.

The Court: Orleans. And your business or occupation?

(Testimony of Charles E. Young.)

The Witness: I am a logging engineer and timber cruiser.

The Court: How long have you been so engaged?

The Witness: I have been born in the business, your Honor. I would say I was actively in the business for 24 years. [245]

The Court: Take the witness.

Direct Examination

Q. (By Mr. Cissna): Mr. Young, are you generally acquainted with the property in Section 34 which has been under discussion here?

A. Yes.

Q. Do you know its location?

A. Yes, sir.

Q. When did you first become acquainted with that property and under what circumstances?

A. Two gentlemen by the name of Cookman and Starritt—they have a small logging operation; I mean they are contractors, small operators—approached me and asked me to inspect the property and look it over, as they wanted to buy the timber, and they further stated that they wished to borrow the money from us.

Q. Now, when you say “us” will you explain who “us” is?

A. Orleans Veneer & Lumber Company.

Q. And you are an employee of the Orleans Veneer & Lumber Co.?

A. Yes, sir.

Q. In what capacity?

A. Logging Engineer and Timber Cruiser.

(Testimony of Charles E. Young.)

Q. What did they ask you to do? When was this, if you know?

A. I believe I stated the exact date in my deposition. I can't quite remember it now. I think it was in October. [246]

The Court: The year?

The Witness: 1956.

Mr. Cissna: Q. And what was their desire, Mr. Young?

A. They wished me to inspect the property and to make my recommendation to the Company for which I work as to whether they would be eligible for a loan on the timber, or possibly we might buy the timber and let them log it.

Q. And did you then inspect the timber with them, or alone? A. Yes, I did.

Q. And when was that, approximately?

A. I think it was on November 5th. I think that was the exact date. I took this from my reports that I made to the company.

Q. Did you write a report to the company on such an inspection?

A. Yes, I certainly did.

Q. I show you a general report dated November 5, 1956, which is marked Defendant's Exhibit 1 in your deposition. I will ask you if that is a photocopy of the general report that you made to your company. A. Yes, it is.

Q. And that refreshes your recollection in this matter? A. Yes, sir.

Q. What did you find when you examined the

(Testimony of Charles E. Young.)

property, or what did you do first in examining the property?

A. Well, it is customary in our business that the first thing—my [247] main job is to locate the proper location of the timber. If I receive a good legal description of it I generally make it my business to locate it as closely as possible, and then I determine the value of the timber, logging conditions, how much road should be built, and also I make an estimate of the expense in logging to see whether it would interest our company and whether the deal has merit. Then I proceed to go on with the work.

Q. How did you locate this property?

A. Well, the corner—they had a map.

Q. Yes. Now, with reference to a map, at the time of your deposition, Mr. Young, Mr. Petrie showed you a copy of a map at the time your deposition was taken: Is that right? You were shown a copy of your map, were you not, sir?

A. Yes, sir.

Q. Did you identify that as the map that you saw?

A. Yes, sir, except for one thing: It wasn't as good a map as I had.

Q. In other words, it wasn't the exact piece of paper that you saw? A. No, sir.

Q. But it was similar in nature; is that correct?

A. Yes, sir.

Q. Was the map that you saw the map which

(Testimony of Charles E. Young.)

has been identified as Plaintiff's Exhibit 10 which was given by Mr. Sims to Mr. [248] Blaylock?

A. Yes, but it wasn't in that good a condition.

Q. In other words, the exact piece of paper you saw was not this piece of paper, either?

A. No, sir.

Q. This was a map had by Mr. Cookman and Mr. Starritt; is that right? A. Yes, sir.

Q. Did you examine that map, Mr. Young?

A. Yes.

Q. Now, when you say it wasn't in that good a condition, what was the condition? What was the nature of your map?

A. Well, the printing on it was very dull. It was a poor print. It was the type of blueprint that is usually used in the business, but some of the writing was not too clear on it. However, it did show the locations, the section, and also Mr. Parrott's signature on it, the fact that he had done the work which made it good enough for me, anyway, and it also showed where he started his survey.

Q. And from that map you were able to locate approximately the position of the property in Section 34?

A. I located Mr. Parrott's work and due to his reputation and—where he started from, which corner I am very well acquainted with, and I know it is the only corner, why, it convinced me that I was in Section 34. [249]

Q. In other words, you examined his actual survey on the ground? A. Yes, sir.

(Testimony of Charles E. Young.)

Q. Did you examine that property?

A. I did.

Q. What did you find?

A. I didn't make my usual thorough examination or, we will say, a complete cruise. It was snowing. The weather was bad. However, I located all the boundaries, all the corners on the property that Mr. Parrott had established, and I made two runs through the timber. I divided the block into an equal two parts and as I went through with a compass, I looked on either side of me, 66 feet.

Q. All right.

A. And I took a rough estimate of what was in there. I have been logging all my life, and also due to tree counting, I estimated the volume. I kept it to myself. I didn't say much. I also established the fact that there had been considerable survey work done there, and the corners were in with the markers.

Q. Were Messrs. Cookman and Starritt with you at that time? A. Yes.

Q. Did you have any further conversation with regard to their request for advance money to eventually buy this?

A. Well, as I stated in my deposition, I knew that they didn't own it, and I also knew they needed money.

Q. How did you know they didn't own it? [250]

A. I asked him.

Q. And what did they tell you?

(Testimony of Charles E. Young.)

A. They told me it was owned by a man by the name of Blaylock.

Q. Now, you say you made a report to your company regarding this? A. Yes.

Q. And the exhibit that you are holding is a copy of the report that you made to your company?

A. That's my first report.

Mr. Cissna: If I may, your Honor, I will have this placed in evidence at this time.

Mr. Petrie: Isn't the original attached to the deposition? Wait a minute. Let me see. No, sir, I have the original here.

Mr. Cissna: May it please the Court, Mr. Petrie has substituted the original of that document, which I am perfectly willing to accept.

The Court: Very well. It may be admitted and marked.

The Clerk: Defendant's Exhibit J.

(Original report made by Mr. Young to his company marked Defendant Orleans Exhibit J in evidence.) [251]

* * * * *

Mr. Cissna: Q. This is the report which you wrote to your office? A. That's right.

Q. Would you identify L. Rochlin and A. Rochlin?

A. L. Rochlin is the General Manager of Orleans Veneer & Lumber Co.

Q. And A. Rochlin?

A. He is also one of the members of the firm.

Q. He is a stockholder in that corporation?

(Testimony of Charles E. Young.)

A. That's right.

Q. E. W. Strauser?

A. He is our Controller.

Q. He is present in Court, sir, is he?

A. Yes, sir.

Q. And how about B. Barrett?

A. He is the timber manager.

Q. This letter was called to your attention by Cecil Yardley. Could you identify him?

A. He was a former employee of ours. He was our local man at Orleans that took care of the logs.

Q. Following the making of this report did you do anything else to investigate this matter?

A. No, I didn't do too much. My job was to determine [255] whether the timber was there. I had another job going at the time. I do lots of this work. I made my report and went on about my business.

Q. Did you make any deal or agreement with Cookman and Starritt regarding this property?

A. I told them, as I stated in my deposition, if I can remember right, that in order that we be interested—I made certain stipulations. The first thing was that we had to have definite proof of ownership of the land of whoever we were dealing with and that we would have to have security and that it would be entirely up to our principals in the town, our Controller, and my boss; that they would decide whether they would act on my recommendations. But I did stipulate that we must have a bona fide deed and something legal.

Q. Did they advise you they had such a deed?

(Testimony of Charles E. Young.)

A. They did. No, they told me they could produce one.

Q. Whose deed was that?

A. Blaylock's.

Q. Did they produce such a deed for you?

A. I didn't see it until later.

Q. But it wasn't produced for you?

A. No.

Q. Subsequent to that transaction did you have any conversations with anyone relating to the property in Section 34?

A. Would you repeat that? [256]

Q. Did you have any conversations with Cookman or Starritt, or with anyone else relating to the property in Section 34? A. Later I did.

Q. Who was that with?

A. Mr. Blaylock.

Q. And when was that?

A. About a week later.

Q. Where was it?

A. It was about November 12th or the 13th.

Q. Who was present?

A. I think he just contacted me alone. He came up to my job where I was building a road.

Q. What was the nature of that conversation? Would you relate it to us, please?

A. Well, he told me that he wanted to sell the timber or possibly sell it to us so that he could get a logging job. He would stipulate that—he said that if we bought the timber, he would log it at a fair price, and I told him at that time that my

(Testimony of Charles E. Young.)

recommendations had gone into town; that I had nothing more to do with it, and I would be glad to help him in any other way, but he would have to go to town. I didn't give it any more thought. It was just a routine matter to me.

Q. You told him you had already looked at this property?

A. Oh, yes. I told him at the time that I didn't think there was the volume in there that he claimed.

Q. Did you make any further report to your company or any members [257] of your company?

A. There was one more letter to it, I don't remember the date. If I could see it——

Q. Showing you a letter of November 12, 1956, from Orleans, California, a letter addressed to "Bill" from "Gene", is this the report that you are referring to?

The Court: What about this letter?

The Witness: This is an informal letter. It is an inter-office letter. "Bill" is William Strauser. Yes, I remember it.

Mr. Cissna: Q. And you wrote this letter?

A. Yes.

Q. Or dictated it?

A. I wrote the letter, yes.

Mr. Cissna: I will ask that this letter be introduced into evidence.

Mr. Petrie: I object to it as being irrelevant.

The Court: Well, I don't know its contents.

Mr. Cissna: Well, may it be marked for identification?

(Testimony of Charles E. Young.)

The Court: And again if the purpose of the offer is on the issue of good faith of the Orleans Company, then you will have no objection?

I take it that is all you expect it to prove, is it?

Mr. Cissna: That is all I expect to prove, yes, your Honor. [258]

The Court: Well, I am glad to hear that.

It may be so marked.

The Clerk: Defendant's Exhibit K.

(The letter referred to dated Nov. 12, 1956, to "Bill" from "Gene" marked Defendant Orleans Exhibit K for identification.) [259]

* * * * *

Q. Following this letter did you prepare such an agreement or have such an agreement prepared?

A. I did not. That was done in town.

Q. Did you have any further discussions with Mr. Blaylock?

A. As I recall, he didn't make it in on that Saturday, and [260] I think the office in town did prepare an agreement. I did not hear from him for quite some time, and finally I did. As I stated in my deposition, I stated I didn't see him when he was in town, but I remember they refreshed my memory and I do remember that I was in the office on the week end in Arcata. Mr. Strauser was there, and I was called in to give an opinion on the matter regarding the contract.

Q. And that opinion regarded what portion of the contract?

A. I think he wanted \$9000 there.

(Testimony of Charles E. Young.)

Q. Rather than the \$7000?

A. Yes. Mr. Strauser asked me whether I thought there was enough timber there to justify the additional \$2000, and I stated that there was.

Q. Did you at any time in talking to Cookman & Starritt or Mr. Blaylock know of any mis-description of property?

A. No. I was told to find Section 34 and the property described therein, and I did.

Mr. Cissna: That is all.

The Court: Court is adjourned until 2:00 o'clock.

(Whereupon at 12:05 p.m. a recess was taken until 2:00 o'clock p.m. of the same day.) [261]

* * * * *

Cross Examination * * * * *

Q. (By Mr. Petrie): Now, you said, Mr. Young, that you talked to Mr. Cecil Yardley first about this possible deal with Cookman and Starritt?

A. That's right.

Q. Can you fix the time approximately with reference to when your reports were made?

A. It was about two weeks before I made the inspection.

Q. Mr. Yardley was then working for the Orleans Company, was he not? A. Yes, sir.

Q. In what capacity?

A. He was the log buyer.

Q. Well, what did Mr. Yardley tell you?

A. He told me that he—that he had a piece of timber, and he wanted my opinion on it, and he wanted me to help him locate it, and make sure he

(Testimony of Charles E. Young.)

was on the right piece of ground. That's the reason I went with him.

Q. Did Mr. Yardley tell you it was a mining claim? A. Yes. [268]

Q. Did he tell you anything else?

A. That's all he told me. He said he didn't know much about it. We just went out on what we call a "Cold turkey deal."

Q. Did he tell you how he found out it was a mining claim?

A. No, he didn't tell me.

Q. Did Mr. Yardley indicate to you through any papers that he had about the ownership to that property?

A. No, not that I can remember.

Q. And after that discussion with Mr. Yardley, you then met with Mr. Cookman and Mr. Starritt; is that right? A. That's right.

Q. And you went with Mr. Cookman and Mr. Starritt to inspect the property for the first time?

A. Right.

Q. Before your inspection of the property, or perhaps during it, if you will tell us which, Mr. Cookman and Mr. Starritt showed you a survey map of the area; is that correct?

A. That's right. It was a map prepared by Mr. Parrott.

Q. Mr. Parrott?

A. Yes, a copy of the original.

Q. And you have testified that the writing or the printing, the lettering on that map, was not as

(Testimony of Charles E. Young.)

good as it is on Plaintiff's Exhibit 10? Was that your testimony, Mr. Young?

A. Yes, sir. This part in here was not discernible.

Q. And by "this part" you are referring to the language [269] appearing on the map in Sections 27 and 28?

A. Yes, in this over here. The description of the corner was not clear. I had a hard time deciphering it. I could barely see that.

Q. Could you make out any of the language on the map that you saw? A. Yes.

Q. How much did you make out?

A. Oh, enough to know—I made enough out of it to know where the corners were.

Q. Well, you did see the word "Homesite" there, did you not? A. Yes.

Q. Now, by the time you saw the word "Homesite" you already had the information from Mr. Yardley that this was supposed to be a mining claim. What did you think when you saw the word "Homesite" on this map?

A. I thought Cecil Yardley had given me misinformation. We had a lot of that.

Q. Did you, yourself, make any further inquiry to reconcile this information as between the mining claim on the one hand and the homesite language that you had seen on the map?

A. As I stated in my deposition, I talked to a couple of old timers down in Orleans regarding the matter just for casual conversation. One was Mr.

(Testimony of Charles E. Young.)

Van Pelt who is an owner of a store there in Orleans, and the other was Ernest [270] Anderson, another elderly man. They stated that they remembered that it was John Patterson's homesite.

Q. And they knew John Patterson?

A. They knew of him.

Q. They knew of him? A. Yes.

Q. And did they tell you of this description in this patent?

A. I knew of no description.

Q. Now, did they tell you? A. No, sir.

Q. Did you make any further inquiry?

A. No, sir.

Q. Did you ask them whether it was a homesite or a mining claim?

A. No, sir. I had made up my own mind by then.

Q. And what was your conclusion?

A. Home site.

Q. Home site? A. Yes, sir.

Q. Now, you went with Mr. Cookman and Mr. Starritt down to look at the property, didn't you?

A. Yes, sir.

Q. And I believe you said it is part of your duties to locate property when you are given a legal description? A. Yes, sir.

Q. Have you had surveying experience, Mr. Young? [271] A. Yes, sir.

Q. How much of it?

A. Oh, about eight years active.

(Testimony of Charles E. Young.)

Q. You are then capable of making a survey yourself? A. Yes, sir.

Q. Now, you went down with Mr. Cookman and Mr. Starritt. Did they point out the land to you, or did you locate it from the map that you had?

A. They showed me the corner where I started from, and from then on I took it.

Q. Following the map that you had?

A. Yes, sir.

Q. Then I believe you said that you made two runs through the property? A. Yes, sir.

Q. Now, you saw land with timber on it, didn't you? A. Yes.

Q. Were there any buildings on that parcel of land? A. No, sir, no buildings.

Q. Were there any improvements of any kind on that parcel of lands? A. No, sir.

Q. Did the land give any evidence or cultivation? A. No, sir.

Q. Did you see any notice of a mining claim? By "Notice" I mean [272] the posted notice.

A. No, sir.

Q. Do you know what the maximum acreage is allowed for a mining claim?

A. Well, you can have 1320 feet by 1660, I think.

Q. That's 20 acres, isn't it? A. Yes.

Q. And this was 62½ acres?

A. Yes, but it could have been two claims.

Q. Pardon me?

A. It could have been two claims.

Mr. Petrie: I have no further questions.

* * * * *

EDWARD STRAUSER

called as a witness by Defendant Orleans, being first duly sworn, testified as follows:

The Court: Your name, please?

The Witness: Edward William Strauser.

The Court: Spell your last name. [273]

The Witness: S-t-r-a-u-s-e-r.

The Court: Where do you live?

The Witness: Eureka, California.

The Court: Eureka?

The Witness: Yes.

The Court: Your business?

The Witness: I am the Controller for the Orleans Veneer & Lumber Company.

The Court: Take the witness.

Direct Examination

Q. (By Mr. Cissna): Mr. Strauser, do you know Mr. Blaylock? A. Yes, I do.

Q. When did you first meet Mr. Blaylock?

A. In our office at Arcata after I had the agreement drawn up where we were to advance the money, and he was to advance the logs. I don't remember the date. It was a week or so after Mr. Young's last report.

Q. Was that the date you signed the agreement?

A. Yes, it was, I believe.

Q. That was the first time you met him?

A. Yes, sir.

Q. Showing you Plaintiff's Exhibit 15, an agreement with a blank day of November, 1956, between Orleans Veneer & Lumber Company and Joseph

(Testimony of Edward Strauser.)

Blaylock, is that the agreement to which you refer?

A. Yes, that is the agreement.

Q. Showing you a copy of this agreement, your office copy, the original thereof with the date thereon, is that the date that agreement was entered into?

A. Yes, sir. That's my handwriting.

Q. And what date was that?

A. December 1, 1956.

Q. And this document refreshes your recollection of the first day you met Mr. Blaylock?

A. Yes, sir.

Q. And the signature upon this agreement is your signature on behalf of Orleans Veneer & Lumber Company? A. It is.

Q. And that was your signature on Plaintiff's Exhibit 15 which was shown to you?

A. Yes, sir.

Q. Prior to that had you had any correspondence with Mr. Blaylock? A. None.

Q. Had you had correspondence with Mr. Young concerning this situation or concerning your purchase or loaning money on this timber?

A. Just a report, a radio conversation, as he testified.

Q. And it was your request that Plaintiff's Agreement referred to be prepared? [275]

A. That's right.

Q. Who prepared it?

A. It was prepared by one of our office secretaries. It was copied more or less along the same lines as we did other agreements.

(Testimony of Edward Strauser.)

Q. In other words, you have made advancements on timber in other situations?

A. Yes.

Q. Did Mr. Blaylock sign the agreement in your presence on December 1st?

A. I believe he did.

Q. Did you also prepare an assignment?

May I have Plaintiff's Exhibit 8, please?

Do you recall preparing an assignment of a deed?

A. Yes, I do.

Q. Showing you Plaintiff's Exhibit 8, I will ask you if this is a copy of the assignment which you prepared? A. Yes, sir.

Q. And did Mr. Blaylock sign this instrument in your presence?

A. Yes, he did, and in the presence of the Notary Public in our office.

Q. And did his wife sign the instrument in your presence?

A. No. She was not there that day. Mr. Blaylock took the agreement with him to obtain her signature.

Q. He took the agreement—he took the assignment or the——[276]

A. He took the assignment.

Q. He left the agreement with you?

A. Yes, sir.

Q. Did he at that time present to you his original deed of this property?

A. Yes. That's where we got the description of the property from the deed.

(Testimony of Edward Strauser.)

Q. At the time you prepared this agreement, did you have the legal description of the property in Section 34? A. No, we did not.

Q. The first time you saw the description was when he came back in with the deed? A. Yes.

Q. Did he present to you any other evidence of his legal ownership of Section 34?

A. No. That was all.

Q. Did he have any title insurance policy, Mr. Strauser?

A. I don't recall if I saw the title insurance policy or not, but I understood he had obtained one. But I was not concerned with that.

Q. What steps did you take on behalf of your company to complete this transaction of money in order to transact the title of money in Section 34 to be certain it was clear?

A. The check was drawn to the title company in Yreka.

Q. The Siskiyou County Title Company? [277]

A. Yes. And when Mr. Blaylock returned the assignment to them and sent it to his wife, they were able to return it to us in the amount of \$9000, showing the land to be free and clear.

Mr. Cissna: Just a minute, your Honor.

(Discussion off the record.)

Mr. Cissna: There being no objection, you may as well mark this letter dated December 3, 1956, sent to the Siskiyou County Abstract Company, Yreka, California, by Mr. Strauser.

The Court: It may be so marked.

(Testimony of Edward Strauser.)

The Clerk: Defendants' Exhibit L.

(Letter Dec. 3, 1956 from Mr. Strauser to Siskiyou County Abstract Co. marked Defendant Orleans Exhibit L in evidence.)

Mr. Cissna: Q. Mr. Strauser, showing you Defendant's Exhibit L, I will ask you if this is your copy of the office letter which you directed to the Siskiyou County Abstract Company?

A. It is. I would like to change one part of my testimony there. I notice the check was made payable to Mr. Blaylock and not the title company, and they were instructed to release the check.

Mr. Cissna: For the record, I will read Defendant's Exhibit L, a letter dated December 3, 1956.

* * * * * [278]

Subsequent to that letter did you receive any correspondence from the Siskiyou County Title Company?

A. Yes. Didn't I ask them—I think I made a pencil notation on the bottom of the letter to the effect of wiring us the day they released the check to Mr. Blaylock so we would know when it was coming out of our accounts, and they prepared a [279] quitclaim deed that they wanted us to file so they could file it with Mr. Blaylock after the indebtedness was repaid. I wrote back and told them that we didn't want to——

Mr. Petrie: Now, your Honor, I object. I thought it was going to be an identification of the correspondence, and apparently it is going beyond

(Testimony of Edward Strauser.)

that. If these letters say that, then I suggest they should be identified and read.

Mr. Cissna: That is what I was going to do. However, I didn't want to interrupt the witness.

Q. Showing you a letter from the Siskiyou County Abstract Company dated December 11, 1956, and a letter from you to the Siskiyou County Abstract Company dated December 13, 1956, I will ask you if those are the letters to which you refer?

A. Yes, sir.

Mr. Cissna: We will ask that these two documents be entered as Defendant's Exhibit next in order.

Mr. Petrie: No objection.

The Court: They may be admitted and marked.

The Clerk: Defendant's Exhibit M.

(Letter Dec. 11, 1956 from Siskiyou County Abstract Co. to Mr. Strauser and letter dated Dec. 13, 1956 from Mr. Strauser to Siskiyou County Abstract Co. were marked Defendant Orleans Exhibit M in evidence.)

Mr. Cissna: Reading the first document of Defendant's Exhibit M from Siskiyou County Abstract Company, Yreka, dated [280] December 11, 1956. [281]

* * * * *

Q. Following this letter, or series of letters, did the Siskiyou County Abstract Title Company issue a policy of insurance in favor of Orleans Veneer & Lumber Company as instructed in these documents? A. They did.

(Testimony of Edward Strauser.)

Mr. Cissna: We will offer in evidence as Defendant's next exhibit in order a title insurance policy in behalf of [282] Orleans Veneer & Lumber Company.

The Court: Any objections?

Mr. Petrie: No objections, your Honor.

The Court: Very well.

The Clerk: Defendant's Exhibit N.

(Title insurance policy in favor of Orleans Company marked Defendant's Exhibit N in evidence.)

Mr. Cissna: Q. And further, Mr. Strauser, did you receive a bill from the Siskiyou County Abstract Company for the issuance of this title insurance policy for certain recording charges?

A. We did.

Q. And did you pay the sum? A. We did.

Mr. Cissna: I next offer in evidence the bill referred to.

The Court: It may be admitted and marked.

The Clerk: Defendant's Exhibit O.

(Bill for recording charges from Siskiyou to Orleans Co. marked Defendant's Exhibit O in evidence.)

Mr. Cissna: Q. Showing you Defendant's Exhibit N, is this the policy of title insurance which you received? A. That is it, yes.

Q. And the property described therein is the property in Section 34; is that correct? [283]

A. That's correct.

Mr. Cissna: Does the Court wish to review this?

(Testimony of Edward Strauser.)

The Court: No.

Mr. Cissna: Q. And showing you Defendant's Exhibit O, is this the billing of the charges which you paid? A. That's right.

Q. From the Siskiyou County Abstract Co.?

A. That's right.

Q. And the amount of that bill was \$71.60 for the continuation of policy of title insurance in the amount of \$9000.00, to recording agreement, to drawing quitclaim deed, and to recording said quitclaim deed? A. Yes.

Q. Did they actually record the quitclaim deed, Mr. Strauser?

Mr. Petrie: If he knows.

Mr. Cissna: Q. If you know.

A. I couldn't say yes or no.

Q. Under your instructions they were not authorized to record such a deed; is that correct?

A. No, they were not to record it.

Q. And to your best knowledge, that deed is still not recorded?

Mr. Petrie: I object.

I will withdraw the objection.

A. No.

Mr. Cissna: Q. Have any sums been paid by Mr. Blaylock [284] to Orleans on the \$9000.00 loan? A. No.

Q. Have any logs been delivered to Orleans by Mr. Blaylock out of Section 34?

A. Not that we know of.

Q. In other words, the agreement entered into

(Testimony of Edward Strauser.)

by you and Mr. Blaylock has not been entered into in any way?

Mr. Petrie: I object.

The Court: The objection will have to be sustained.

Mr. Cissna: Q. Going back to 1955 and including 1956, did Orleans Veneer & Lumber Company purchase any logs from Joseph Blaylock?

A. No.

Q. At the time of your deposition in October of this year taken by Mr. Petrie in the City of Eureka, California, you were asked by Mr. Petrie to search the records of Orleans Veneer & Lumber Company to determine if any logs were purchased from Joseph Blaylock during 1955 and 1956. Did you search those records?

A. I personally searched those records and also the girl in the office. There was no record of any logs being purchased by Mr. Joseph Blaylock during that period.

Mr. Cissna: I believe that is all.

Mr. Hennessy: No questions, your Honor. [285]

Cross Examination

Q. (By Mr. Petrie): Well, Mr. Strauser, you heard Mr. Blaylock say that in 1955 he sold 57,000 board feet of logs to your company, did you not?

A. Yes, I did.

Q. Have you any reason to believe that he is mistaken?

A. No. I might explain this. The logs did not

(Testimony of Edward Strauser.)

come in under the name of Joseph Blaylock.

Q. They came in under a different name?

A. Yes. We purchased logs under the name of John Stevens.

Q. What was the amount of the logging that you purchased under Mr. Stevens' name?

A. I think it was 57,500 feet.

Q. The figure that Mr. Blaylock has stated?

A. Yes.

Q. Was Mr. Blaylock present once or twice in your office in Arcata?

A. Once, I believe. It was on the date the agreement was signed.

Q. Did you then prepare the agreement from information supplied to you by Mr. Young and without seeing Mr. Blaylock yourself?

A. Yes. We relied on Mr. Young's reports. We drew up the agreement the way we understood it to be.

Q. Did you ever talk to Mr. Cecil Yardley about this transaction?

A. No, sir. [286]

Q. You do know who Mr. Yardley is, do you not?

A. Yes, sir.

Q. Now, I suppose from time to time your company advances moneys such as was done here; is that so?

A. Yes. It is quite common.

Q. I suppose you advance moneys both to owners who own the land and the timber on it, you advance moneys to people who just have contracts to log the timber?

A. That's right.

Q. Now, when you advance moneys to owners of

(Testimony of Edward Strauser.)

the land and timber, is it not customary in your company to take a deed of trust from those owners to secure the advance made?

A. It is handled both ways: Deeds of trust just assignment of interest such as we did in this case.

Q. Can you recall another transaction——

I show you Plaintiff's Exhibit 8, a copy of the assignment from Mr. Blaylock to you?

A. Yes.

Q. Can you recall another transactions where you advanced moneys to the owner of timber land and took from him such a document as that?

A. I can.

Q. Which one was that?

A. Their name was Bywiler.

Q. When did you advance moneys to him? [287]

A. That would be about two years now, two years ago.

Q. Can you recall any other incidents?

A. Not where this particular assignment was noted, no.

Q. Now, the last several years have you advanced moneys several times to owners of timber land?

A. Not too much. We are trying to get away from that.

Q. Well, how many times since you have been with the company has the company advanced money to owners of timber land?

A. You mean just to the owners of timber land?

(Testimony of Edward Strauser.)

Q. Yes.

A. To the owners of timber land only?

Q. Yes, putting aside for the moment a transaction where the man has a timber cutting contract.

A. I would say about three or four times is all.

Q. And on those occasions except the ones you mentioned, you took deeds of trust for the timber land, did you not?

A. To tell you the truth, I can't rightly answer you on that.

Q. Well, you didn't take an assignment?

A. No.

Q. Such as Plaintiff's Exhibit 8?

A. No, it was another form of agreement drawn up by our attorneys, whatever that might be.

Q. You did not consult your attorneys before having Plaintiff's [288] Exhibit 8 prepared, did you?

A. No, I don't believe so because this was drawn up by another attorney.

Q. It was you who suggested the form to be followed? A. That's right.

Q. And wasn't that form taken from the file of timber cutting contract advances?

A. That's right.

Mr. Petrie: I have no further questions, your Honor.

The Court: Any questions?

Mr. Friedman: No questions, your Honor.

(Testimony of Edward Strauser.)

Redirect Examination

Q. (By Mr. Cissna): How many times during this same period of time, Mr. Strauser, has your company advanced money to timber contractors or loggers?

A. That would be safe to put it that way. I would say it would be anywhere from ten to fifteen, at least.

Q. Under which they had a contract with the owner to remove the timber; is that correct?

A. That's right.

Q. And in those instances what type of security document do you use?

A. It is an agreement and an assignment in one, assigning all their interest in the contract, and an agreement to deliver us [289] all the logs.

Q. In either fashion, do you take a security document securing your advance against the security to the property?

A. That's right. In case anything should happen to the operator, we would go in.

Q. And the document you have in your hand is the security which you accepted in this instance?

A. That's right.

Mr. Cissna: That's all.

The Court: You may be excused.

(Witness excused.) [290]

[Endorsed]: Filed July 7, 1958.

[Endorsed]: No. 16096. United States Court of Appeals for the Ninth Circuit. Joseph F. Blaylock, Appellant, vs. United States of America, Appellee. Orleans Veneer and Lumber Co., a corporation, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Northern District of California, Southern Division.

Filed: July 8, 1958.

Docketed: July 18, 1958.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16096

UNITED STATES OF AMERICA,

Appellant,

vs.

JOSEPH F. BLAYLOCK, et al.,

Appellees.

STATEMENT OF POINTS ON APPEAL

Pursuant to rule 75(d) Defendant and Appellant Joseph F. Blaylock intends to rule on the following points on appeal:

(a) That the State of California was a bona fide purchaser for value of the land sought to be re-

formed and therefore any subsequent sale by the State of California cuts off the United State's right to reformation.

(b) That the purchase by H. E. Sims from the State of California of the patent sought to be reformed was a sale to a bona fide purchaser for value and therefore cut off the equities of the United States to the right of reformation.

(c) That the State of California has a right to rely on the regularity of patents issued by the United States and does have a right and jurisdiction to tax lands covered by patents issued by the United States.

(d) That a tax sale regularly held pursuant to California law eliminates all equities of all predecessors in interest to the defaulting tax payer and all lien holders of the defaulting tax payer including the right of the United States to procure a reformation of the original patent.

Dated this 10th day of November, 1958.

BURTON & HENNESSY,

/s/ By MICHAEL T. HENNESSY,

Attorneys for Defendant and Appellant Joseph F.
Blaylock.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 12, 1958. Paul P.
O'Brien, Clerk.

No. 16,096

**United States Court of Appeals
For the Ninth Circuit**

JOSEPH F. BLAYLOCK,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

ORLEANS VENEER AND LUMBER Co., a
Corporation,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

**Appeals from the United States District Court for the
Northern District of California,
Southern Division.**

Honorable Michael J. Roche, United States District Judge.

APPELLANT JOSEPH F. BLAYLOCK'S OPENING BRIEF.

BURTON & HENNESSY,

300 North Main Street, Yreka, California,

Attorneys for Appellant

Joseph F. Blaylock.

FILED

MAY - 5 1959

PAUL P. O'BRIEN, CLERK



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I.

If either the State of California or defendant Sims, or both, were bona fide purchasers for value of the land described in Patent No. 822606, that is the land in Section 34, then the right to reformation by the United States has been cut off and cannot arise again by reason of the conveyance from defendant Sims to appellant Blaylock	3
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II.

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No. 16,096

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vs.

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**Appeals from the United States District Court for the
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Honorable Michael J. Roche, United States District Judge.

APPELLANT JOSEPH F. BLAYLOCK'S OPENING BRIEF.

STATEMENT OF CASE.

This is an appeal from the judgment of the District Court for the Northern District of California, Southern Division, in which the District Court re-

formed a Homestead Patent No. 822606 so as to change a legal description of such patent from a fractional portion of Section 34, Township 13 North, Range 6 East, H.M., in Siskiyou County, California (hereinafter referred to as Section 34) to a fractional portion of Sections 27 and 28, Township 13 North, Range 6 East, H.M., (hereinafter referred to as Sections 27 and 28; see Tr. pp. 46-47; p. 42).

The facts as set forth in the findings are the facts for the purposes of this appeal. In substance they are as follows: Homestead Patent No. 822606 was originally issued to one John Patterson in 1921, and the land described in such patent was in Section 34. This land was assessed and taxed by the State of California, and by the legal description of Section 34 was deeded to the State of California in 1943 for non-payment of taxes pursuant to California Revenue and Taxation Code, Section 3520. Then in 1946 the State of California deeded the same land described in Homestead Patent 822606, which was the description of the land in Section 34, to Defendant Hyrum S. Sims, the predecessor in interest to Appellant Blaylock. Thereafter, defendant Sims deeded the same land described in Section 34, to appellant Blaylock.

The sole question raised by appellant Blaylock in this appeal is the legal significance of the tax sale to the State of California, and the sale from the State of California to defendant Sims. It is thus the contention of appellant Blaylock that:

(a) That the State of California was a bona fide purchaser for value of the land sought to be reformed

and therefore any subsequent sale by the State of California cuts off the United States' right to reformation.

(b) That the purchase by Hyrum S. Sims from the State of California of the patent sought to be reformed was a sale to a bona fide purchaser for value and therefore cut off the equities of the United States to the right of reformation.

(c) That the State of California has a right to rely on the regularity of patents issued by the United States and does have a right and jurisdiction to tax lands covered by patents issued by the United States.

(d) That a tax sale regularly held pursuant to California law eliminates all equities of all predecessors in interest to the defaulting tax payer and all lien holders of the defaulting tax payer including the right of the United States to procure a reformation of the original patent.

ARGUMENT.

I.

IF EITHER THE STATE OF CALIFORNIA OR DEFENDANT SIMS, OR BOTH, WERE BONA FIDE PURCHASERS FOR VALUE OF THE LAND DESCRIBED IN PATENT NO. 822606, THAT IS THE LAND IN SECTION 34, THEN THE RIGHT TO REFORMATION BY THE UNITED STATES HAS BEEN CUT OFF AND CANNOT ARISE AGAIN BY REASON OF THE CONVEYANCE FROM DEFENDANT SIMS TO APPELLANT BLAYLOCK.

Appellant submits that it is well settled that a right of reformation is cut off once there is a conveyance to a bona fide purchaser for value. *Sherwood v. Robertson*, 48 Cal. App. 208, 191 Pac. 972 (1st Dist.

1920); *United States v. Payson*, Fed. Cas. No. 16,016, 1 C. L. J. 325 (1863). And we further submit that it is a further fundamental principle that once the right of reformation has been cut off by a sale to a bona fide purchaser for value, it does not arise again because such bona fide purchaser might sell to another purchaser who has knowledge of the error or mistake which would have entitled the original grantor to reformation had reformation been sought prior to the time of the conveyance to such bona fide purchaser. *American Mortgage Company v. O'Hara*, 56 Fed. 278 (9th Cir. 1893), *Rutgers v. Kingsland*, 7 N.J.Eq. 178 (1848).

II.

THE STATE OF CALIFORNIA AND DEFENDANT HYRUM S. SIMS WERE BONA FIDE PURCHASERS FOR VALUE OF THE LAND DESCRIBED IN SECTION 34 AND THEREFORE THE RIGHT TO REFORMATION OF THE ORIGINAL HOMESTEAD PATENT NO. 822606 HAS BEEN CUT OFF.

The United States stipulated that in the conveyance of real estate in Section 34 to the State of California and in the conveyance by the State of California to Hyrum S. Sims that the taxing procedure was regular and that the State of California had no knowledge at either time of any misdescription of such patent (Tr. p. 55). Thus by the stipulation the United States has acknowledged that the State of California would have been a bona fide purchaser for value if it was in fact a "purchaser". At the outset it was the position of the United States that a tax

deed conveyed only such interest as the tax payer had in the land, and the United States had originally cited the case of *Syme v. Warden*, 114 Cal. App. 707 as an authority for such a proposition. However, the case of *Syme v. Warden*, *supra*, was expressly disapproved in the case of *Helvey v. Sax*, 38 C. 2d 21, 237 P. 2d 269 where the Supreme Court of California stated (page 24) that the statement in the case of *Syme v. Warden* that the tax deed only conveys such interest as the tax payer had in the land was inconsistent with the cases and the statutes controlling and was expressly disapproved. In the case of *Helvey v. Sax*, *supra*, the Court went on to state that a tax deed conveys not merely the title the person who is assessed had, but a new and complete title under an independent grant from the State.

In the case of *Merchants Finance Corporation v. Kuchel*, 83 C.A. 2d 579, 189 P. 2d 513 (3rd Dist. 1948) the court stated:

“There is a conflict of authorities in other jurisdictions regarding the nature of the title which is acquired by the deed to the state for delinquent taxes. Some authorities hold that the state thereby acquires only an inchoate title, which may subsequently become absolute by failure of the owner to redeem the property as provided by statute . . . But, in California, a different rule now prevails. It is now definitely determined in this state that upon execution of the deed to the state for delinquent taxes, the property owner forfeits all rights in the property except the privilege of redeeming it at any time before the state disposes of it.”

Therefore, since the United States has already stipulated (page 55) that the taxing procedures were regular and that the State of California had no knowledge of any misdescription of any patent and further, since Mr. Sims testified that he had no knowledge of any misdescription of such patent at the time he purchased the property at the tax sale (Tr. p. 60), the sale in 1943 to the State of California of the property in Section 34, pursuant to Revenue and Taxation Code of the State of California, Section 3520, was a conveyance to a bona fide purchaser for value and cut off all equities including the right of reformation in the United States. Further, the subsequent sale in 1946 by the State of California to Defendant Hyrum S. Sims, pursuant to Revenue and Taxation Code, Sections 3710 et seq., was likewise another conveyance for a bona fide purchaser for value and cut off any equity of reformation in the United States.

III.

THE STATE OF CALIFORNIA DID HAVE JURISDICTION TO TAX THE PROPERTY IN SECTION 34.

By way of anticipation of the argument of the United States, appellant respectfully submits that the only factor which could defeat his title to the property in Section 34 would be the lack of jurisdiction in the State of California to tax the property therein. It was upon this basis that the trial court decided in favor of the United States and we assumed it will be upon

this basis that the United States will advance arguments against such jurisdiction.

In the case of *U.S. v. Stinson*, 197 U.S. 200 (1905), the Supreme Court of the United States held that there is a great presumption in favor of the regularity of patents, that they are issued correctly and that third persons have a right to rely upon this presumption because of the great importance of stability of deeds, and that therefore, the court will protect bona fide purchasers for value against any rights which the United States might have to cancel or reform such patents. Such being the case since there is a presumption as to the regularity of such patent, and since a bona fide purchaser for value can cut off the right of the United States to either cancel a patent or reform a patent, then the grant by the United States must be a grant of legal title to the property described in the patent. If there were no grant of legal title when a patent was either mistakenly described or fraudulently procured, it would be impossible for a bona fide purchaser to cut off the rights of the United States (Cf. Cases on negotiable instruments as to void instruments and voidable instruments). Therefore, since legal title must have been granted to John Patterson in Section 34 by Homestead Patent No. 822606, then there must be jurisdiction in the State of California to tax such land for the State of California has jurisdiction to tax any land or property in which an individual other than the United States has a legal interest. (Cf. *City of Detroit v. Murray Corporation of America*, 355 U.S. 489, 78 S. Ct. 458 (1958).)

CONCLUSION.

For the above reasons appellant Blaylock respectfully submits that the trial court erred in the matter set forth in paragraphs 1, 2, 3 and 4 of such judgment together with that portion of such judgment which awarded costs of suit against appellant Blaylock, and appellant respectfully requests that the judgment of the trial court be reversed and that title to the property described in Section 34 be quieted in appellant Blaylock as against the United States.

Dated, Yreka, California,

April 29, 1959.

Respectfully submitted,

BURTON & HENNESSY,

By MICHAEL T. HENNESSY,

Attorneys for Appellant

Joseph F. Blaylock.

No. 16,096

United States Court of Appeals
For the Ninth Circuit

JOSEPH F. BLAYLOCK,
vs. *Appellant,*

UNITED STATES OF AMERICA,
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ORLEANS VENEER AND LUMBER Co., a
corporation,
vs. *Appellant,*

UNITED STATES OF AMERICA,
Appellee.

BRIEF OF APPELLANT
ORLEANS VENEER AND LUMBER CO.

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Attorneys for Appellant
Orleans Veneer and Lumber Co.

FILE

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vs.

UNITED STATES OF AMERICA,

Appellee.

**BRIEF OF APPELLANT
ORLEANS VENEER AND LUMBER CO.**

1. BLAYLOCK'S PURCHASE PROTECTS ORLEANS.

In this portion of the brief, it is the desire of Orleans Veneer and Lumber Co. to adopt the brief of appellant Joseph F. Blaylock in order to prevent repetition of facts, argument and authorities. It is submitted that appellant Blaylock's position be first determined by the Court. In the event that Blaylock is the legal owner of Section 34, Orleans' position is

that of a holder of a security instrument and party to an enforceable agreement with Blaylock, which does not concern this Court.

However, as the trial Court apparently based its decision on the lack of the jurisdiction of the State of California to tax the land involved here in Section 34, this phase of the case will be covered briefly by this appellant.

A review of the cases cited by the trial Court, that is: *Miller v. McKenna*, 23 Cal. 2d 774, 174 Pac. 2d 531, and *Gaspard v. Edward M. Le Baron, Inc.*, 107 Cal. App. 2d 356, 256 Pac. 2d 278, are found to involve issues other than are to be determined here. The law enunciated by these cases regarding the jurisdiction of the state to tax becomes applicable only if it can be said that title to subject Section 34 property remained in the appellee at all times, or that the reformation now sought, if granted, restores the title back to the appellee as of the date the appellee originally granted it by patent. The above cited cases generally concern erroneous assessments of public land held by a governmental body.

It must be admitted that title to the subject Section 34 property left appellee, whether it was intended or not, and that it rested in the patentee, whether he intended it or not, as a patent is a conveyance from the United States to some person, transferring title from the government in and to the land itself. *Los Angeles v. Mono County*, 108 Cal. App. 655, 292 Pac. 539. A patent of land from the United States passes to the patentee all of the interest of the United States,

whatever it may be, including things connected with the soil as timber and improvements on the realty which are a part thereof. *Fremont v. Flower*, 17 Cal. 199; *Collins v. Bartlett*, 44 Cal. 371. By so doing, it became the property of a citizen of the State of California over which the State has jurisdiction to levy tax and follow the legislative enactments of sale as was done. By issuing a patent, the government was estopped to assert title to the premises. *Boggs v. Merced Mining Co.*, 14 Cal. 279. After the patent is issued the land ceases to be public land of the United States. *Vore v. Ephraim*, 173 Cal. 245, 154 Pac. 719.

The equitable doctrine of reformation is not applied "nunc pro tunc." The rights of intervening third parties are protected by statute as will be hereinafter discussed. Therefore, if title left the appellee and is to be restored now, the acts of all parties, including that of the State of California, must be considered. While the appellee has a right to show it is the real owner of the subject Section 34 property, it can be done only without prejudice to the rights acquired by third parties, in good faith, for value. The State of California had the right to tax the property of one of its citizens who held the title thereto, and the right to sell it to the purchaser Blaylock.

Even where a patent is illegally obtained, which is not the case here, it carried legal title to the patentee even though the act under which the patent was secured declares that in such a case the patentee must forfeit the money he paid for the lands and all right and title to them, and that any grant or conveyance

he may have made, except in the hands of a bona fide purchaser, is null and void. If title would in fact be void, he would have none to convey to a bona fide purchaser. *Mery v. Brodt*, 121 Cal. 332, 53 Pac. 818. This patent is not void on its face to prevent a bona fide purchaser.

If the property was not within the state's taxing jurisdiction, where was it?

“All property in this state, not exempt under the laws of the United States or of this state, is subject to taxation under this code.” *California Revenue and Taxation Code*, Section 201.

If title had been conveyed by the patentee, Patterson, to a bona fide purchaser for value, without notice, the United States could show its ownership, subject only to the third party's rights. The method of transfer through the state to Hyrum S. Sims seems no different than any other transfer.

In the event that the Court finds that Orleans is not protected by Blaylock's position, Orleans states its further position as follows:

2. ORLEANS IS A BONA FIDE MORTGAGEE.

The facts and position of Orleans must be examined in the light of certain statutes:

Civil Code, Section 1107.

“Every grant of an estate in real property is conclusive against the grantor, also against everyone subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title

or lien by an instrument that is first duly recorded.”

Civil Code, Section 1214.

“Every conveyance of real property, other than a lease for a term not exceeding one year, is void as against any subsequent purchaser or mortgagee of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded, and as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action.”

Civil Code, Section 1215.

“The term ‘conveyance’ as used in Sections 1213 and 1214, embraces every instrument in writing by which an estate or interest in real property is created, alienated, mortgaged or encumbered, or by which the title to any real property may be affected, except wills.”

Civil Code, Section 3399.

“When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to the rights acquired by third persons, in good faith and for value.”

FACTS REGARDING ORLEANS VENEER AND LUMBER CO.

The facts concerning and of which this appellant was aware as shown in the transcript are briefly as follows:

Subsequent to the purchase by Blaylock of the property in Section 34, the property was first brought to the attention of Orleans Veneer and Lumber Co. in the week prior to November 5, 1956. A Mr. Yardley, previously an employee of Orleans Veneer and Lumber Co., mentioned it to Mr. Young, timber cruiser and logging engineer of Orleans Veneer and Lumber Co., as a mining claim which loggers Cookman and Starritt were interested in logging and in need of an advance of money. Mr. Young examined the property on November 5, 1956, accompanied by Cookman and Starritt, noting that it was not a mining claim, as it was too large in area. He located the surveyed property by an old, worn and torn map furnished by Cookman and Starritt upon which considerable portions of the printing were not legible. He stated that he noted the map only for an attempt to locate the property, and that he was able to do so even though he encountered heavy snow and rain that day. No examination of the map was had for purposes other than to locate the property. The map was thought to be similar to the photocopy of the Parrott survey map which Hyrum S. Sims furnished to Blaylock (Plaintiff's Exhibit 10) but in much worse condition. Young located the property by starting at a corner that he later found to be the parcel which had been occupied by Hyrum S. Sims.

It should be noted that no employee of Orleans Veneer and Lumber Co. knew of Sims' ownership of either parcel at any time until Blaylock furnished Orleans Veneer and Lumber Co. the deed from Sims to the property in Section 34, which was in December of 1956. Even then, employees of Orleans Veneer and Lumber Co. knew nothing of Sims' claimed ownership and right to log, and that he had logged the property in Sections 27 and 28.

Mr. Young stated that his purpose was to locate and examine the property for volume and logging. He estimated approximately one million board feet could be removed. He made a report of this work to Orleans by his letter of November 5, 1956. (Defendant Orleans' Exhibit J.)

It cannot be said that any notice, actual or constructive, can be given to Orleans Veneer and Lumber Co. from the fact that the parcel was a homestead instead of a mining claim as Mr. Young had been advised, nor can it be said that Orleans had any duty to make further inquiry as to the source of ownership because of such a fact.

Mr. Young was approached by Blaylock on November 12, 1956 who, according to Cookman and Starritt, was the owner of the property. Blaylock desired a loan with the property to be given as security, and with all the logs to be removed therefrom to be delivered to Orleans Veneer and Lumber Co. Young wrote a letter to "Bill" (Strauser) of Orleans Veneer and Lumber Co. regarding the matter. (Orleans' Exhibit K.)

Subsequently Mr. Strauser prepared an agreement (Plaintiff's Exhibit 15) and the security instrument (Plaintiff's Exhibit 8) and the same were executed thereafter by the parties, and the security instrument and \$9,000.00 delivered to the Siskiyou County Title Company with a letter of instructions (Orleans' Exhibit L) to issue title insurance, record the security instrument and issue the \$9,000.00 to Blaylock. The title company then asked for a quitclaim deed to be held in escrow to clear title to the Section 34 property when the money was repaid and the agreement completed. The same was furnished. (Letters of transmittal in evidence as Orleans' Exhibit M.)

Mr. Strauser, as Mr. Young, had no information or no indication that there was a misdescription of patent, or that it was claimed by others that Blaylock was not the owner of the Section 34 property, or that title to the property was through a tax sale by the State of California until some months later, as the title company did issue title insurance showing Blaylock to be the owner of the property in Section 34. (Orleans' Exhibit N.) Based upon these facts, Orleans Veneer and Lumber Co. is in the position of a bona fide mortgagee.

NATURE OF THE INSTRUMENT.

The document is a security instrument conveying an interest in real property, and the document affects title to real property.

The document begins "As security for the payment and the performance of all other terms and conditions . . ." and after describing the property affected, states as follows:

"This assignment and transfer is not a sale, but is solely by way of security. In case of any default hereunder or of said agreement, Orleans Veneer and Lumber Co. may enforce its rights under this assignment and transfer either as a pledgee, mortgagee or in any other manner permitted or provided by law."

Mr. Blaylock stated he intended to give security with the timber only, and Mr. Strauser of Orleans Veneer and Lumber Co. stated that it was intended to transfer all rights to the property as security. However, this makes no difference, as it has been well settled in California that timber and trees are real property. *McKeever v. Locke-Paddon Co.*, (1922) 207 Pac. 1040, 58 Cal. App. 51, *Stockel v. Slich*, (1931) 297 Pac. 925, 112 Cal. App. 588.

It is only where standing timber is purchased separately from land for the purpose of severance, as to those claiming under or by reason of the contract of sale, that timber is personal property. *Palmer v. Wahler*, (1955) 285 Pac. 2d 8, 133 Cal. App. 2d 705.

The document therefore pertains to real property. It also affects the title to real property and is a conveyance of an interest in it. Such was stated to be the intention of both parties affected by the instrument, as evidenced by the testimony of Mr. Blaylock and Mr. Strauser, and such testimony is admissible

to explain any ambiguity created by the document, if any ambiguity can be said to exist. Needless to say, it is not the normal or typical document used in such a situation. However, it is felt that its meaning is clear. Orleans Veneer and Lumber Co. may enforce its rights under the document as a mortgagee. While the document is not labeled a mortgage, it is a security instrument giving to Orleans Veneer and Lumber Co. the same rights as a mortgagee.

Mortgages are specifically included as a conveyance under Section 1215 of the Civil Code for the meaning of the word as used in the Recording Act. (Section 1214 of the Civil Code.) *Booker v. Castillo*, (1908) 98 Pac. 1067, 154 Cal. 672. Deeds of trust are also conveyances for the purposes of such statute. *Barbari v. Rothschild*, 7 Cal. 2d 537, 61 Pac. 2d 760 (1936). A lease of property is likewise a conveyance. *Dean v. Brower*, (1932) 119 Cal. App. 412, 6 Pac. 2d 580. Likewise, an assignment for the benefit of creditors is a conveyance. *Moore v. Schneider*, 196 Cal. 380, 238 Pac. 81 (1925). See also *Kellogg v. Huffman*, (1934) 137 Cal. App. 278, 30 Pac. 2d 593. See also *Lyon's Estate*, 163 Cal. 803, 127 Pac. 75, wherein it was held,

“A mortgagee comes within the rule relating to purchasers for value and is protected in the same manner. He is entitled to protection under the recording statute as a bona fide grantee.”

BONA FIDE.

The Court in *Torrez v. Gough*, 137 Cal. App. 2d 62 at page 71, 289 Pac. 2d 840 (1955) states that the primary purpose of Section 1214 of the Civil Code was to protect those who in good faith acquire an *interest* in real property in reliance on the record.

The Court, in *Beach v. Faust*, (1935) 40 Pac. 2d 822, 2 Cal. 2d 290, stated as follows:

“The recording laws were not enacted to protect those whose ignorance of title is deliberate and intentional, nor does a mere nominal consideration satisfy the requirement that a valuable consideration must be paid. Their purpose is to protect those who honestly believe they are acquiring a good title and who invest some substantial sum in reliance on that belief.”

The *Southern Pacific Company v. Dore* case, 34 Cal. App. 521, 168 Pac. 147, relating to a grant of the “right, title and interest” of the grantor relied upon by appellee concerns only covenants created by such a document and does not concern the rights of third parties as the instant case.

The *Lombardi v. Sinanidea* case, 71 Cal. App. 272, 235 Pac. 455, relied upon by appellee also states the language is that of a grant of quitclaim, and did not involve the recording statutes. These statutes must of necessity be involved in this present proceeding. Because an instrument is a quitclaim instrument does not prevent the grantee from becoming a bona fide party, as the Court stated in *Beach v. Faust*, *supra*, following the quotation,

“That a deed conveys merely the right, title and interest of the grantor does not prevent the grantee from being a purchaser for a valuable consideration, without notice, within the recording laws, so as to be protected from unrecorded instruments affecting the title to the property of which he had no notice.” (Case citations.)

“The pertinent provisions of our recording laws are found in Sections 1213, 1214 and 1217 of the Civil Code. It has long been the accepted rule in this state that real estate, or an interest in real estate, can be aliened or assigned by a quitclaim deed. *Graff v. Middleton*, 43 Cal. 341, 344. Such a deed is good as against even an unrecorded grant, bargain and sale deed. *Dunn v. Carroll*, 101 C. A. 209, 281 P. 506 and cases cited.”

There can be no doubt that Orleans Veneer and Lumber Co. is protected by the recording statutes as well as by the reformation statutes. (Civil Code Section 3399.) The Federal Court's function in such a case as this is to inquire how California Courts have applied the statute. *McConnell v. Pickering Lumber Corp.*, (1955) 217 Fed. 2d 44, which case involves Civil Code Section 3399. The United States Government is not exempt from the affect of such statutes.

Section 3399 of the Civil Code states that

“contracts (includes deeds,) may be revised to express the intention of the parties, *so far as it can be done without prejudice to the rights acquired by third parties in good faith and for value.*” (Emphasis added.)

This general rule of law as codified in California is almost universally established. See 44 A. L. R.,

page 79 and the supplemental annotation in 102 A. L. R., page 826, covering cases and jurisdiction applying the doctrine protecting innocent parties or subsequent encumbrancers for a present consideration. See also 44 A. L. R., page 98, covering and reporting cases denying reformation "where the instrument identified an entirely different piece of property."

This doctrine has long been the law and was applied in *United States v. Payson*, District Court, N. D., California (1863) Federal Cases, Volume 27, Federal Case 16,016 against the reformation of a deed under a patent. The Court said as follows:

"If the description in the deed were impossible or repugnant, the Court would, necessarily, be obliged to construe it and correct its calls so as to make them conform to the probable intention of the parties. But the tract partly on land and partly on water, described in the deed, may have been intended to be granted though it seems to me highly improbable. The surveyor who furnished the description may have measured the land courses and have obtained the others by calculation. And, as against third parties, who purchased the remaining interest of the grantor at Sheriff's sale, ignorant of his intentions in making his previous conveyance, except so far as the conveyance disclosed them, it has appeared to me that this application to reform it cannot, in this proceeding, be entertained."

The government contends the word "assignment" in the security instrument cannot operate as a conveyance of real property. It is noted in 15 Cal. Jur. 2d, page 402, paragraph 6 as follows:

“The term ‘assignment’ may be used to signify a transfer of title to or ownership of property. Thus, while ‘assign’ is not one of the usual operative words of a conveyance of real property, it may be used as such.”

See *Commercial Discount Co. v. Cowen*, 18 Cal. 2d 610, 116 Pac. 2d 599 to the effect that the word “assign” may be used to indicate an act whereby title to property is conveyed, and that the word “transfer” may be synonymous with the word “convey,” and connotes the passing of title by legal instrument. It is further defined in Civil Code Section 1039 as follows:

“Transfer is an act of the parties, or of the law, by which the title to property is conveyed from one living person to another.”

See also *Beffa Estate*, 54 Cal. App. 186, 201 Pac. 616. The words “assign” and “transfer” are sufficient to convey property by deed or will.

If the words are sufficient, and there can be no doubt of it, and it was the intention of the parties to convey an interest in the real property, Orleans Veneer and Lumber Co. is and must be a taker for value and without notice under the facts and circumstances. As such, even though legal title may now be found to be in the United States Government, Orleans Veneer and Lumber Co. has an equitable interest of \$9,000.00 in said property, and the United States Government must be said to hold legal title subject to said mortgage of Orleans Veneer and Lumber Co.

CONCLUSION.

Therefore, Appellant Orleans Veneer and Lumber Co. respectfully submits that the Court determine Blaylock's position first. In considering the matters, the Court must determine if there is a bona fide purchaser prior to determining the right to reformation. If a bona fide purchaser exists, reformation can be had only subject to the third party's rights. Then, even though it is found that the United States Government is now to be the legal owner, that the Court order and decree that such ownership is subject to the equity of the mortgage and contract interest of the Appellant Orleans Veneer and Lumber Co.

Dated, Eureka, California,

May 6, 1959.

Respectfully submitted,

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*Attorneys for Appellant Orleans
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No. 16096

**In the United States Court of Appeals
for the Ninth Circuit**

JOSEPH F. BLAYLOCK, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**ORLEANS VENEER AND LUMBER Co., A CORPORATION,
APPELLANT**

v.

UNITED STATES OF AMERICA, APPELLEE

**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION**

BRIEF FOR THE UNITED STATES, APPELLEE

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OPINION BELOW

The memorandum opinion of the district court (R. 33-39) is reported at 159 F. Supp. 874. The findings of fact and conclusions of law appear in the record at pages 39-45.

JURISDICTION

This is an appeal from a judgment of the district court entered March 28, 1958 (R. 46-48). Notice of appeal was filed by appellants Joseph F. Blaylock and Orleans Veneer and Lumber Co. on May 19 and May 27, 1958, respectively (R. 48, 50-51). The jurisdiction

of the district court over this suit by the United States rested on 28 U.S.C. sec. 1345. The jurisdiction of this Court rests upon 28 U.S.C. sec. 1291.

QUESTIONS PRESENTED

1. Whether the State of California did or could tax and sell a tract of land in a national forest rather than a homestead on adjoining land the patent to which had mistakenly used a description of the national forest tract, and, if so,

2. Whether a timber company buying the timber from the forest tract was a bona fide purchaser without notice of the right of the United States to correct the mistake.

STATEMENT

This action was instituted by the United States to obtain a permanent injunction against the cutting of timber by appellant Blaylock from a tract of forest land lying within the Klamath National Forest. In addition to the injunctive relief, the United States sought additional relief in the nature of a deed of the forest tract from appellant Blaylock, a judgment declaring that the forest tract belongs to the United States free of any liens including the asserted interest of appellant Orleans Veneer and Lumber Co. (hereafter "Orleans") and also reformation of patent No. 822, 606 (Pl. Ex. No. 1; Tr. 4-5) to describe the land homesteaded by the patentee. The relevant facts are as follows:

The patent was issued September 13, 1921, to John Patterson, who resided with his family upon land homesteaded within the Klamath National Forest (R. 55-57). The patent contained the following description of the land patented:

Northeast quarter of the northwest quarter, the east half of the east half of the northwest quarter of the northwest quarter, the north half of the north half of the southeast quarter of the northwest quarter and the northeast quarter of the northeast quarter of the southwest quarter of the northwest quarter of Section thirty-four in Township thirteen north of Range six east of the Humboldt Meridian, California, containing sixty-two and fifty-hundredths acres.

Property taxes assessed for the year 1937 were not paid by Patterson and in 1943 a Conveyance of Real Estate was issued by the Siskiyou County tax collector to the State of California describing the land taxed as follows (Pl. Ex. No. 2; Tr. 5):

HOMESTEAD ENTRY #02655 IN NW $\frac{1}{4}$ -
DESIG. PLAT #4 SEC 34 TWP 13 R. 6E
HM DITCH AND WATER RIGHT.

In 1946 Hyrum Sims, who lived in the vicinity, after first inspecting the Patterson homestead, requested that it be put up for sale at public auction and, as the successful bidder, obtained a tax deed describing the land sold as follows (Pl. Ex. No. 3; Tr. 6):

H.E. #02665 Por. of NW $\frac{1}{4}$ (Ditch & Water Right) Section 34, Twp. 13 North, Range 6 East HM.

Sims moved on to the homestead in 1951 and had it surveyed the following year by the county surveyor. The homestead was marked on the southeast corner by a blazed Madrone tree, but the survey showed the homestead to be in sections 27 and 28, instead of in

section 34 as indicated by the tax deed which Sims had received from the State of California (Tr. 18-20, R. 60). Upon learning that the homestead did not lie in section 34 as stated in his tax deed, Sims wrote the following in a letter to the Supervisor of the Klamath National Forest dated March 19, 1952 (Pl. Ex. No. 11-D, Tr. 50-52):

About five years ago I obtained a parcel of land amounting to $62\frac{1}{2}$ acres in the Klamath forest. This was through a tax sale by Siskiyou County. The land was advertised according to law, and sold to me as the highest bidder. Since then I have resided continually on same and have made my home there. This land was homesteaded by John Patterson in 1921 and lies in Section 34, Township 13N-R 6 E, Siskiyou County. Legal description as follows:

NE $\frac{1}{4}$ NW $\frac{1}{4}$ -E $\frac{1}{2}$ E $\frac{1}{2}$ NW $\frac{1}{4}$ NW $\frac{1}{4}$ -
NE $\frac{1}{4}$ NE $\frac{1}{4}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$ -N $\frac{1}{2}$ N $\frac{1}{2}$
SE $\frac{1}{4}$ NW $\frac{1}{4}$ -R6-E HM 65-50 Acres List
5-2436 Serial 02655.

The buildings have been on the place approximately forty years and the corner marked by the forest service is clearly shown on a map prepared by A. F. Parrott, Siskiyou County official surveyor. I have spent quite a lot of money on a road to the place and rebuilding.

Last week I called Mr. Parrott to come down and survey this ground and mark all four corners. He ran a line from an established section line corner on the Klamath River road to my property and found that there was an approximate two thousand foot discrepancy in the locations. The place where I am living is in Section 27 and 28, and the land described

legally as mine is in Section 34 an unimproved, untouched piece of heavily timbered land.

The land I thought I owned has all my buildings on it and a large meadow, access road, fences, etc. What I want to do is to make an exchange so a new legal description will fit my ground.

For information and a complete clear map of the situation, contact Mr. A. Parrott, Siskiyou County Surveyor.

Please advise me as soon as possible as to the procedure to pursue from this point on. I have contacted the Land Management Office here and they referred me to you as the necessary first step in this matter. This is an urgent matter, and if you can expedite it in any way, I would be very grateful.

In response to his letter Mr. Sims received the following reply, dated March 27, 1952, from the Forest Service (Pl. Ex. No. 11-C, Tr. 52-54):

We have consulted with Mr. Parrott on the mislocation of your lands. In comparing Mr. Parrott's maps and the original Homestead report, it is apparent that the description of your land is in error or that the original township survey of 13 N., R. 6 E., is very irregular.

If the original description of your lands is in error, we will be pleased to recommend that you be given an adjusted homestead patent describing the correct area that was originally intended by both the Forest Service and the original locator to be patented.

Before making such a recommendation we are seeking the advice of our regional engineer, as the only known corner of which we

have a record is the re-established corner from which Mr. Parrott ran his survey, and is $1\frac{1}{2}$ miles distant from your lands. The original land survey in this section of the country has been found to be very irregular and it might be possible that there is a corner closer to your lands that might describe your lands differently than the corner $1\frac{1}{2}$ miles distant from which Mr. Parrott's survey originated. If such is the case, and we recommend an erroneous description for a patent adjustment, we might do you more harm than good.

We are asking our regional engineer to advise us on the best procedure for accurately describing your lands as they exist on the ground. It may be that he will recommend a further survey by Mr. Parrott so that you may be assured of the correct description of your lands. However, you may be assured that we will assist you in every way to secure an adjusted patent that will accurately describe your lands.

After a meeting between Mr. Sims and the Forest Service Supervisor, the latter wrote Sims another letter, dated July 23, 1952, which was in part as follows (Pl. Ex. 11-B, Tr. 56):

To further clarify your understanding of our letter and conversation, the following is the situation that exists:

1. We recognize your right to the $62\frac{1}{2}$ acre tract now occupied and marked by the property corner you described. You can go ahead with the development of the $62\frac{1}{2}$ acre tract even though the description is in error. This includes cutting of the timber.

2. We would be willing to accept an amended patent description covering the 62½ acres when a resurvey is made.

Sims had the timber standing upon the homestead logged in 1953, 1955, and 1956. One of those who logged the timber in 1955 and 1956 was appellant Blaylock (Tr. 59-60).

On June 25, 1956, a quiet title action was brought in behalf of Sims by counsel for appellant Blaylock against the administratrix of the estate of John Patterson, deceased, and a judgment was obtained quieting title to the forest tract to Sims according to its legal description as contained in the homestead patent. The judgment entered July 2, 1956, recited that Sims had been in actual exclusive and adverse possession of that tract but Sims later testified in this proceeding that he had never resided upon the forest tract (R. 63-64). The United States was not named as an interested party in that action nor was the State (Pl. Exs. Nos. 4, 5; Tr. 7).

Within a week, on July 9, 1956, Sims gave Blaylock both a quitclaim deed describing the homestead by metes and bounds and a grant deed describing the forest tract according to the legal description contained in the homestead patent (Pl. Exs. Nos. 6, 7; Tr. 7, 8). A copy of the homestead patent was recorded on July 10, 1956 (Pl. Ex. No. 1). Thereafter, appellant Blaylock executed a document assigning all his right, title and interest in the grant deed from Sims to appellant Orleans Veneer and Lumber Co. as security for the performance of an agreement whereby Blaylock re-

ceived \$9,000.00 for the timber in the forest tract (R. 31-32, 67-69, Pl. Ex. No. 8).

The case was tried before the district court without a jury and judgment was entered for the United States (R. 46-48). In a memorandum opinion filed March 4, 1958, the district court concluded that through mistake the patent issued to Patterson, the homestead entryman, described the forest tract instead of the homestead intended to have been patented, that Sims had intended to buy the homestead from the State of California and that the United States has a right to reformation of the patent and other documents of title involved. In answer to appellant Blaylock's defense that he had purchased the forest tract from Sims in good faith, for value and without notice of the Government's interest in the land, the district court pointed out that Blaylock had known of the arrangement with the Forest Service whereby Sims had been permitted to log the homestead, that Sims had given Blaylock a copy of the county surveyor's map showing the locations of both the homestead and the forest tracts, that Sims had told Blaylock that the latter would not have any right to the timber on the forest tract, and that, therefore, Blaylock was not a bona fide purchaser (R. 36-37, 61-62; Tr. 67-69, 78, 85).

In answer to Blaylock's defense that the State of California and Sims were bona fide purchasers of the forest tract and thereby had cut off the Government's rights of reformation, the district court said that because the United States as the real owner had always been in possession of the land and had a right as

against the homestead entryman to reformation of the patent, the forest tract was not within the state's jurisdiction to tax (R. 37).

The district court also held that laches was not available against the United States in enforcing its right in property held in trust for the people, and that Orleans Veneer and Lumber Co. could acquire no rights in the forest tract superior to those of the United States because the origin of the company's claim is a tax deed defective for want of taxing jurisdiction (R. 37-38). This appeal followed.

SUMMARY OF ARGUMENT

I

A. Since the source of Sims' title, through whom appellants claim their interests in the forest tract, is the tax deed, Sims could convey an interest only in the land actually taxed and sold to him. The entryman and his family resided upon the homestead tract and this land was subject to taxation by virtue of the fact that the entryman had earned equitable title thereto and was described in the tax records as a homestead entry. The forest tract, however, was unimproved and unoccupied and the fact that it was described in the patent issued by the United States was not learned until after Sims obtained his tax deed from the state. The land taxed and sold to Sims must, therefore, have been the homestead.

B. Until all conditions have been met upon which the right to a patent depends, the United States retains the equitable title to the land. The issuance of a patent which mistakenly describes land not intended

to be patented and for which the conditions of a patent have not been met does not deprive the United States of its equitable title to the land. The United States retains such an interest in the land, therefore, as to make its taxation by the state void.

II

Orleans Veneer and Lumber Co. must be charged with notice of the Government's interests in the forest tract since the tract was within the national forest, the record showed that the source of title was a homestead patent and any physical observation of the land would show it could not have been a homestead.

ARGUMENT

I

THE STATE OF CALIFORNIA DID NOT AND COULD NOT TAX THE NATIONAL FOREST TRACT

A. The tax records and the tax deed related to the homestead and not the national forest tract: Sims gave to Blaylock two deeds, one to the homestead and the second to the forest tract, each purporting to convey Sims' interest in the tract. Since the source of Sims' interest in either tract is the tax deed from the State of California, he could obviously pass an interest to Blaylock in only one of the two tracts.

The homestead with its buildings, meadow, and orchard was the residence of the Patterson family (R. 56-58, 83-84). This land was subject to taxation by the state, for once Patterson had resided upon the land, improved it and otherwise complied with the laws under which the patent was subsequently issued

to him, the United States no longer had any real interest in the land. Patterson had become the "beneficial owner" of his homestead. He held the equitable title to the land and there existed no bar to its taxation. *Carroll v. Safford*, 3 How. 441 (1844); *Van Brocklin v. State of Tennessee*, 117 U.S. 151, 169 (1886); *Wisconsin Railroad Co. v. Price County*, 133 U.S. 496, 505 (1890); *Bothwell v. Bingham County*, 237 U.S. 642, 647 (1915); *Miller v. Imperial Water Co. No. 8*, 156 Cal. 27, 30, 103 Pac. 227, 229 (1909). By relation back to the inception of the equitable title the patent, once it issues, completes the title obtained at a tax sale. *Hussman v. Durham*, 165 U.S. 144, 148 (1897).

The homestead was thus liable to local taxation. The tax deed from the county to the state shows that that is what was taxed. It expressly refers to "Homestead Entry #02655". In fact, the deed does not describe by metes and bounds sectional description or otherwise a tract of land so that it can be located on the ground. Instead, simply as identification, it refers to the homestead entry. "IN [i.e. within] NW $\frac{1}{4}$ DESIG. PLAT #4 SEC. 34 TWP 13 R. 6E HM DITCH AND WATER RIGHT". It is thus impossible from the deed by itself to tell what land is conveyed. A purchaser would have to either look at the land and find a homestead with a ditch in Section 34 (and there is none) or look to the federal land records. Those records would show a homestead entry of Patterson who mistakenly believed he was in section 34. Plainly it was the Patterson homestead

which the county purported to deed to the state for taxes.

It is equally clear that it was the Patterson homestead which the state purported to sell to Sims. The same description, in briefer form, was used. The deed said "H.E. #02665 Por. [Portion] of NW $\frac{1}{4}$ (Ditch & Water Right) Section 34, Twp. 13 North, Range 6 East HM." And the fact is that Sims, who had requested that the land be sold for taxes, inspected the homestead and made it his home after receiving the tax deed (R. 58-59). It is only by reference to the homestead entry that a description sufficient to make the deed valid can be found.

The forest tract, according to Sims' description of it in his letter to the Forest Service, is "an unimproved, untouched piece of heavily timbered land," *supra*, p. 5 (Pl. Ex. No. 11-D). Witness Young, who cruised the timber on this land for Orleans Veneer and Lumber Co., said that there were no buildings or other improvements upon it and that it bears no evidence of cultivation (R. 85). There is nothing to indicate that this land was ever occupied or that it was ever considered to be anything but a part of the Klamath National Forest. Thus, the tax deeds did not specify what part or portion of the NW $\frac{1}{4}$ of section 34 was conveyed. Neither the taxing officials nor grantees could find a homestead in section 34. Plainly they did not intend to deal in any way with the national forest rather than the homestead. Reformation to correctly describe the location of the homestead could have been attained by Patterson, had he known of the error, and such relief was

properly awarded to the United States. R.S. 2372, as amended by the Act of February 24, 1909, 35 Stat. 645, 43 U.S.C. sec 697; 43 CFR 104; *Le Marchal v. Tegarden*, 175 Fed. 682 (C.A. 8, 1909). Reformation of the patent to describe the land intended to have been patented was available to the United States, *United States v. Hudson*, 269 Fed. 379 (C.A. 8, 1920), for "it cannot be doubted that inadvertence and mistake are * * * grounds for judicial interference to divest a title acquired thereby. This is equally true, in transactions between individuals, and in those between the government and its patentee. If, through inadvertence and mistake, a wrong description is placed in a deed by an individual, and property not intended to be conveyed is conveyed, can there be any doubt of the jurisdiction of a court of equity to interfere and restore to the party the title which he never intended to convey?" *Williams v. United States*, 138 U.S. 514, 517 (1891).

There is no room here for a defense to such reformation of bona fide purchase. Having purchased the homestead from the State of California, Sims had no title or interest in the forest tract which he could convey to appellant Blaylock. His purported deed therefore was void for want of a title in Sims. Although for reasons stated, *infra*, pp. 18-21, Orleans Veneer and Lumber Co. must be charged with notice of the Government's rights in the timber tract, nevertheless, assuming the company had no notice of those rights, its claim to the forest tract must fail, since an instrument wholly void cannot be made the foundation of a good title even under the equitable doctrine of bona

fide purchase. The mere fact that an encumbrancer acted in good faith in dealing with one who apparently held the legal title is not in itself a sufficient basis for relief. *Bryce v. O'Brien*, 5 Cal. 2d 615, 616, 55 P. 2d 488, 489 (1936); *Trout v. Taylor*, 220 Cal. 652, 656, 32 P. 2d 968, 970 (1934); *Bernhard v. Wall*, 184 Cal. 612, 625, 194 Pac. 1040, 1046 (1921). As stated in *Trout v. Taylor*, at p. 657, the loss resulting must fall where the course of business has placed it. The company's recourse, if any, is against Blaylock who took the deed from Sims with knowledge of the Government's interest in the forest tract. Put otherwise, bona fide purchase cuts off equities but does not create legal title. The only federal land patented, the only land taxed and sold for taxes, was the homestead, which was erroneously described as being located in part of the NW $\frac{1}{4}$ of section 34.

B. *Even if the state and county had purported to tax and sell the land embraced in the legal description of Patterson's patent, the result would have been the same:* For purposes of this case it has been assumed that a survey according to the legal description in Patterson's homestead patent would apply to the tract of national forest lands appellants seek to log.¹ The local authorities could not have taxed such land because lands owned by the United States are not

¹ While there have been unofficial surveys, an official Government public lands resurvey has never been made to determine how to correct the errors (*supra*, p. 7). The district court avoided this difficulty by using a metes and bounds description of the homestead. Of course, so long as the land remains in the national forest there is no pressing need for a resurvey.

subject to state taxation. This is so, because the power vested in Congress by the Constitution "to dispose of * * * property belonging to the United States," Art. IV, Sec. 3, "implies an exclusion of all other authority over the property which could interfere with this right or obstruct its exercise." *Wisconsin Railroad Co. v. Price County*, 133 U.S. 496, 504 (1890); *United States v. Allegheny County*, 322 U.S. 174 (1944). As the *Wisconsin Railroad Co.* case shows (p. 505) the question of taxability of land within the purview of the public land laws does not depend upon legal title to the land, but upon the existence or absence, as the case may be, of any beneficial interest in the land on the part of the United States. Thus, as shown *supra*, p. 10-11, once equitable title has been earned by the entryman his land is subject to taxation. But until all conditions have been met upon which the right to a patent depends, the United States retains the equitable title to the land and therefore has such an interest in the land as to make its taxation void. *Irwin v. Wright*, 258 U.S. 219 (1922); *Sargent v. Herrick*, 221 U.S. 404 (1911); *Hussman v. Durham*, 165 U.S. 144 (1897). "The reason for the rule against state taxation until the equitable title passes from the United States to the entryman" is "placed upon the policy of the Government to require those who sought government land to perform the required conditions of residence or improvement before beneficial title, subject to state taxation, passes from the United States to the locator." *S.R.A., Inc. v. Minnesota*, 327 U.S. 558, 568 (1946).

In *Hussman v. Durham, supra*, a formal certificate of location was issued in 1858 to one Craig by the Department of the Interior for land located in that year under a bounty warrant. The records of the department showed on their face a full equitable title passing to Craig. In 1888 the requisite payment to the United States was made by Durham who had obtained conveyances from Craig and a patent issued the following year to Craig, his heirs and assigns. Durham then commenced suit to quiet his title as against the defendant Hussman holding the tax title. The Supreme Court said that the validity of the tax title held by Hussman depended upon the question whether the equitable title had passed from the Government to Craig. Since payment was not made until after the land had been sold for taxes, the tax sale and tax deed were void because the Government retained the equitable title even though its records showed the passing of full equitable title to Craig. The title by relation, upon the issuance of the patent, dated only as of the inception of the equitable title with the payment made in 1888 and therefore nothing passed by the state's tax deed.

In this present case nothing has been done in compliance with the public land laws towards the acquisition of the forest tract. The issuance of the patent to Patterson, the homestead entryman, with the erroneous description of the homestead to which he had earned equitable title did not deprive him of that title, nor did it deprive the United States of its equitable title to the forest tract actually described in the patent even assuming that bare legal title to the forest

tract did pass. As we have said, Patterson could have obtained a correction of his patent to properly describe his homestead if he had known of the error and the United States could now do likewise.

There is no merit to appellant Blaylock's assertion (Br. 4-6) that the State of California and Sims were bona fide purchasers of the forest tract and thereby cut off the Government's right to reformation of the patent. In the first place, as we have pointed out (*supra*, p. 10-13), the state's deed conveyed a homestead, not the forest tract. Secondly, the conveyance of property to the state by the county tax collector "is not a sale but is merely a book transaction to facilitate the adjustment of accounts between the tax collector and the auditor," *Weber v. Wells*, 154 F. 2d 1004, 1005 (C.A. 9, 1946), or, in other words, a sale "by operation of law and the declaration of the Tax Collector." *Stockton Harbor Indus. Co. v. Commissioner of Int. Rev.*, 216 F. 2d 638, 649 (C.A. 9, 1954), cert. den. 349 U.S. 904. The purpose of the sale is not the acquisition of property but the collection of taxes. *Angelo Cal. Nat. Bank v. Leland*, 9 Cal. 2d 347, 353, 70 P. 2d 937, 939-940 (1937); *People v. Maxfield*, 30 Cal. 2d 485, 487, 183 P. 2d 897, 898 (1947). Thirdly, so long as the United States retained the equitable title in the forest tract as against Patterson, the land was exempt from taxation. The state could neither obtain for itself, nor pass to its grantee Sims, a title derived from a tax proceeding void for lack of jurisdiction over the property. *Gaspard v. Edward M. LeBaron, Inc.*, 107 Cal. App. 2d 356, 360, 237 P. 2d 278, 280 (1951); *Sheeter v. Lifur*, 113 Cal. App. 2d

729, 738-739, 249 P. 2d 336, 342 (1952). While it is not important here, it seems clear that a subsequent bona fide purchase could not confer tax jurisdiction nor validate the void deed.

Patterson, the homestead entryman, sold the homestead to no one. Prior to the tax sale there was none to claim the equitable protection of a bona fide purchaser. The United States was, therefore, as stated by the district court, the real owner of the national forest ^{TRACT} at the time of taxation (R. 37). As holder of the equitable title to the forest tract the United States retained such an interest in the land as to make its taxation by the State of California void.

II

THE ORLEANS VENEER AND LUMBER CO. IS NOT A BONA FIDE MORTGAGEE

Appellant Orleans claims under the equitable doctrine of bona fide purchase to have relied on the record without notice of any equitable claim of the United States. This contention fails for the first reason, which we have given, that Blaylock had no interest which could be encumbered. Moreover, the facts show that Orleans had both legal and actual notice of the title of the United States.

The record chain of title on which Orleans relies showed, in the two tax deeds as well as the patent, that a homestead, together with a ditch and water rights, was involved. Certainly all persons dealing with former public domain are charged with notice that the federal homestead requirements include residence and cultivation, which necessarily means a

house, a clearing of some size in the forest, other appropriate improvements, and means of access. Likewise, all persons are, of course, charged with knowledge of facts which appear from physical observation of the land in question. Mr. Young, for the company, said he visited the tract prior to execution of the contract and that he saw timber on it but saw "no buildings," no "improvements of any kind," no "evidence or [sic of] cultivation" (R. 85). The absence of any sign of present or former habitation, we submit, by itself puts any purchaser, charged with knowledge that he is buying a supposed homestead, on notice that the property is still owned by the United States, especially when it contains a valuable stand of timber within the exterior boundaries of a national forest.

Indeed, the fact is that Mr. Young, for the company, had actual knowledge that this was supposed to be the Patterson homestead (R. 83-84). The closest this witness came, on direct examination, to asserting that he had no idea the land was still national forest land was that he did not know of any misdescription, that "I was told to find Section 34 and the property described therein and I did" (R. 81). This was the only witness offered by the company who had examined the land. This evidence falls far short of sustaining the burden resting upon Orleans.

"The absence of notice is an essential requirement in order that one may be regarded as a bona fide purchaser." *Basch v. Tide Water Etc. Co.*, 49 Cal. App. 2d 743, 746, 121 P. 2d 545, 546 (1942); *Kenniff v. Caulfield*, 140 Cal. 34, 45, 73 Pac. 803, 806 (1903):

Eversden v. Mayhew, 65 Cal. 163, 167, 3 Pac. 641, 644 (1884). The burden of proof in this respect rests upon the party who claims the benefit of the protection afforded a bona fide purchaser to prove lack of notice if none existed. *James v. James*, 80 Cal. App. 185, 195, 251 Pac. 666,⁶⁷⁰ (1926); *Fitzgerald v. Terminal Development Co.*,¹ 11 Cal. App. 2d 126, 133, 53 P. 2d 177, 180 (1936). What constitutes notice depends of course upon the facts of the particular case but it is equally true, as stated in *Barthelmess v. Cavalier*, 2 Cal. App. 2d 477, 488, 38 P. 2d 484, 490 (1934), that:

The existence of facts calculated to put a reasonable person upon inquiry, coupled with a duty to inquire will, if not pursued, deprive a person of his position as a *bona fide* purchaser. And inquiry becomes a duty when the facts are inconsistent with a perfect right in him who proposes to sell. It also exists where the facts of which the purchaser should be aware are calculated to awaken suspicion. Of necessity, no definite rule can be formulated as to what, in a particular instance, is sufficient to arouse suspicion. But the better rule is that

information even as to collateral facts which if pursued would have led to the discovery of the ultimate facts is sufficient to charge the person failing to pursue.

Any possible weight of the direct examination of the witness Young is destroyed by cross-examination where he said that he knew he was looking for a home-stead and that he saw no evidence of occupation or cultivation. No attempt was made by redirect examination to explain away these admissions, which are fatal to the claim of bona fide purchase. The company apparently relied upon a title insurance policy issued to Blaylock (Orleans' Brief, p. 8). "A title opinion cannot be sufficient to satisfy a duty to inquire as to possible equitable interest any more than it can without inquiry as to rights of parties in possession." *Webster v. Knop*, 6 Utah 2d 273, 278, 312 P. 2d 557, 560-561 (1957). Nor can the reliance upon a title insurance policy relieve Orleans Veneer and Lumber Co. of the duty to make further inquiry in this instance. Certainly title insurance cannot operate to destroy rights of third parties, the possible existence of which is the reason for the insurance.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court was correct and should be affirmed.

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No. 16,096

**United States Court of Appeals
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JOSEPH F. BLAYLOCK,
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vs.

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**Appeals from the United States District Court for the
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Honorable Michael J. Roche, United States District Judge.

APPELLANT JOSEPH F. BLAYLOCK'S CLOSING BRIEF.

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FILE

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PAUL P. O'BRIEN, G

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ARGUMENT.

**I. THE STATE OF CALIFORNIA DID HAVE JURISDICTION
TO TAX THE LAND PATENTED.**

In its reply brief, the United States appears to have confused the factual situation at bar in order to use

the cases cited in its brief. The brief speaks as if the United States after it has issued its patent still retains equitable title to the land so described. We respectfully submit that the cases cited do not support this position. First of all in the cases cited by the United States, principally the cases of *Hussman v. Durham*, 165 U.S. 144 (1897), *Wisconsin Central Railway v. Price County*, 133 U.S. 496 (1889), *Irwin v. Wright*, 258 U.S. 219 (1922), *Sargent v. Herrick*, 221 U.S. 404 (1910), were all cases where either there was an attempt to tax an entryman's interest prior to the time of the issuance of the final certificate and patent or there was action taken by the United States to rescind or reform a patent prior to the issuance of such final certificate. Appellant Blaylock concedes that if the situation at bar were one where the original patentee had not received his final certificate and patent, then, of course, there would not be jurisdiction in the State of California to have taxed such land.

But such is not the case. In the plaintiff's amended complaint in paragraph III thereof, the plaintiff states as follows:

"On September 13, 1921, plaintiff issued to Patterson Homestead Patent Number 822,606, which patent contained the following description: . . . Northeast quarter of the Northwest quarter, the East half of the East half of the Northwest quarter of the Northwest quarter, the North half of the North half of the Southeast quarter of the Northwest quarter and the Northeast quarter of the Northeast quarter of the Southwest quarter of the Northwest quarter of Section 34 in Township

13 North, Range 6 East of the Humboldt Meridian, California, containing 62.50 acres.” (Tr. page 8.) This very same quotation is found as Finding of Fact No. 3. (Tr. pages 40-41.)

Thus, once the final certificate was issued, and *a fortiori* when the patent was issued, equitable and legal title to the property described in such patent has passed to the patentee from the United States and the United States has parted with all its title and control over such lands except before a court of equity.

The Supreme Court in the case of *Moore v. Robbins*, 96 U.S. (6 Otto.) 530 (1877) states:

“But if no such appeal be taken, and the patent issued under the Seal of the United States, and signed by the President, is delivered to and accepted by the party, the title of the government passes with this delivery. *With the title passes away all authority or control of the executive department over the land, and over the title which it conveyed.* It would be as reasonable to hold that any private owner of land who has conveyed it to another can, of his own volition, recall, cancel or annul the instrument which he has made and delivered. If fraud, mistake, or error or wrong has been done, the Courts of Justice present the only remedy. These Courts are as open to the United States to sue for the cancellation of the deed or reconveyance of the land as to individuals; and if the government is the party injured this is the proper course. (Emphasis added.)

“ ‘A patent’, says the Court in *U. S. v. Stone*, 2 Wall 525, ‘is the highest evidence of title and is

conclusive as against the Government and all claiming under junior patents or titles, until it is set aside or annulled by some judicial tribunal.' " . . .

"It is a matter of course that, (after the patent is granted) neither the Secretary or any other executive officer can entertain an appeal. He is absolutely without authority. If this were not so, the titles derived from the United States, instead of being the safe and assured evidence of ownership which they are generally supposed to be, would be always subject to the fluctuating, and in many cases unreliable, action of the land office. No man could buy of the grantee with safety, because he could only convey subject to the right of the officers of the government to annul his title."

Thus, when the United States issued its patent to the land described in Section 34, the patent so issued was not void on its face but was only voidable by the United States in a suit for reformation. Inasmuch as it was only voidable and not void there would be jurisdiction in the State of California to tax. This distinction between a patent being void and voidable has not been faced by the United States. We wish to point out that the Supreme Court in the case of *Colorado Coal & I Co. v. United States*, 123 U.S. 307 (1887) faced a situation where the Attorney General sued to cancel certain patents as void and among the various contentions were, first, the contention that the lands patented were never actually settled and that the affidavits supporting the same were false. There was further the allegation that the grantees were ficti-

tious. The Supreme Court in denying the application of the United States made the following statement:

“It is fully established by the evidence that there were in fact no actual settlements and improvements on any of the lands, as falsely set out in the affidavits in support of the preemption claims and the certificates issued thereon. This undoubtedly constituted a fraud upon the United States, sufficient in equity as against the parties perpetrating it, or those claiming under them with notice of it, to justify the cancellation of the patents issued to them. But is not such a fraud as prevents the passing of legal title by the patents. It follows that to a bill in equity to cancel the patents upon these grounds alone the defense of *bona fide* purchaser for value without notice is perfect.

In reference to such a case it is said by this Court in *U. S. v. Minor*, 114 U.S. 233, 243: ‘Where the patent is the result of nothing but fraud and perjury it is enough to hold that it conveys the legal title. . . .’ ”

The *Colorado Coal* case goes on to hold that only in the case of a fictitious grantee is the patent actually void, and the court held in that particular case that there was not sufficient evidence of such fictitious grantee. In the case at bar, there is no problem but that Mr. Patterson actually existed. Therefore, at the very best the patent is merely voidable and not void and as such title passed to the patentee which gives the State of California jurisdiction to tax.

The question of jurisdiction to tax has been faced by courts in early cases. In the case of *Cannon v.*

Hood River Irrigation District, 70 Ore. 71, 154 Pac. 397, 399 (1916) the Oregon Supreme Court held:

“Where a homestead entry has been made under the laws of the United States, final proof submitted, and final certificate issued, it operates to transfer an equitable estate, and immediately renders the land liable to taxation, although the United States holds the title *until the patent issues*” (Emphasis added.)

Likewise the court in *Burcham v. Terry*, 55 Ark. 398, 18 S.W. 458 (1892) held that in a suit by a tax sale vendee to recover possession of the land which he purchased at the tax sale wherein a defense was raised that although the original patentee had obtained his “final certificate” he had not obtained the patent yet from the United States, the court held:

“ ‘When a person does everything that is necessary to entitle him to a patent to a tract of public land, he becomes the equitable owner thereof. The land is segregated from the public domain, ceases to be the property of the government, and, in absence of limitations and restrictions legally imposed, becomes subject to private ownership, and all the incidents and liabilities thereof.’ Among the most certain incidents and liabilities of ownership of property by a private person is its liability to taxation . . . the Chancery Court that rendered the decree under which (the lands) were sold to the State and jurisdiction of the subject-matter of a suit which was a proceedings *in rem*”.

For the above reasons, we respectfully submit that since the homestead patent involved in the within case was issued on September 13, 1921, the State of Cali-

for California after such date did have the jurisdiction to tax the real property described in such patent; that the situation at bar is not a situation in which the State of California was attempting to tax an entryman's right after a certificate of location was made but prior to the time of patent as was the situation in the various cases cited by the United States. Therefore, the contention of the United States that the State of California did not have jurisdiction to tax the land described in such patent is without merit.

II. THE STATE OF CALIFORNIA DID TAX THE LAND DESCRIBED IN THE PATENT.

The United States raises as a defense what we submit to be a rather specious contention that the State of California did not intend to tax the property described in the patent but merely intended to tax homestead entry No. 02655 wherever that might have been. We would first wish to point out that the United States has stipulated that at the time of the conveyances both to and from the State of California that the taxing procedures were regular and that the State of California had no knowledge at either time of any misdescription of the patent. (Tr. page 55.) This being the case, it is quite evident that the State of California would not have had jurisdiction to tax any land other than the land described in the patent.

From all the cases cited by the United States in its brief and by the foregoing cases, it is quite evident that there is no jurisdiction to tax by a state upon an entryman's notice of location. *Hussman v. U. S.*, 165

U.S. 144 (1897). This line of cases has held that where an entryman has filed a notice of location that there is no jurisdiction to tax until the entryman has completed all the things required for him to do by law and that he either have received or be entitled to receive a final certificate.

Insasmuch as there was no notice of location as to the land in sections 27 and 28, it is inconceivable that entryman Patterson would have had equitable title to the land on which he was located. But even if he did have an equitable title, such title was cut off by the issuance from the United States land office of Patterson's final certificate and after the patent is issued he certainly could not have had any equitable title to any land not described in the patent. (See *Moore v. Robbins*, *supra*.) Because of all the cases cited on the importance and stability of patents, we submit that it is quite evident that the thing taxed by the State of California was the property described in the patent. Naturally, it is the procedure of most tax collectors and assessors not to list out the full legal description of the land. One can walk into any assessor's office within the State of California and the land which is taxed is merely referred to either by tract or parcel number or by a tract in a certain section and township. The particular identification involved in the case at bar was homestead Entry No. 02655 within the northwest quarter designated Plat No. 4 Section 34 Township 13 North, Range 6 East. We submit, therefore, that the only thing which the State of California could have had jurisdiction to tax and the only thing

which was in fact taxed was the patented property in section 34.

CONCLUSION.

For the above reasons and the reasons stated in appellant's opening brief, appellant contends:

That a patent was issued to one patentee Patterson in Section 34; that thereafter the State of California taxed the land in Section 34 and pursuant to law such land was sold to the State of California without any knowledge of any misdescription of patent and later by the State of California to Hiram S. Sims without any knowledge of any misdescription of patent; that under California law a tax proceedings is a proceedings of purchase and cuts off the rights of former owners and is not merely an incomplete conveyance as it is in some states. Therefore the right of reformation to the United States to reform the within patent has been cut off by a conveyance to *bona fide* purchasers and for such reasons we respectfully submit that the judgment of the United States District Court for the Northern District of California, Southern Division, be reversed.

Dated, Yreka, California,

September 28, 1959.

Respectfully submitted,

BURTON & HENNESSY,

By MICHAEL HENNESSY,

Attorneys for Appellant

Joseph F. Blaylock.

No. 16150 ✓

In the
United States Court of Appeals
FOR THE NINTH CIRCUIT

MORTIMER A. KLINE,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

AND

GORDON OIL COMPANY,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appealed from The Tax Court of the United States

BRIEF FOR PETITIONERS

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Respondent.

Appealed from The Tax Court of the United States

*To the Honorable Judges of the United States Court of
Appeals for the Ninth Circuit:*

MORTIMER A. KLINE (herein called Kline) and
GORDON OIL COMPANY (herein called Gordon), Peti-
tioners herein, hereby submit this brief in support of their
petitions for review of decisions of The Tax Court of the
United States and respectfully show:

JURISDICTION AND VENUE

Petitioner Kline was the petitioner in The Tax Court proceeding bearing docket number 57291, which court had jurisdiction of that proceeding pursuant to Section 7442 of the Internal Revenue Code of 1954 (R. 6.) Kline is a resident of Los Angeles, California, with offices at 812 General Petroleum Building, 612 South Flower Street, Los Angeles 17, California (R. 6, 18, 24). His income tax return for the taxable year ended December 31, 1951, the period here involved, was filed with the Collector of Internal Revenue for the Sixth District of California (R. 6, 18, 24), which district is located within the jurisdiction of this Honorable Court.

Petitioner Gordon was the petitioner in The Tax Court proceeding bearing docket number 57292, which court had jurisdiction of that proceeding pursuant to Section 7442 of the Internal Revenue Code of 1954 (R. 9). Gordon was a corporation organized under and by virtue of the laws of the State of California with principal office at 812 General Petroleum Building, 612 South Flower Street, Los Angeles 17, California (R. 9, 21, 25). Gordon filed its income and excess profits tax returns for the taxable period January 1, 1951 to August 31, 1951, the period here involved, with the Collector of Internal Revenue for the Sixth District of California (R. 9, 21, 25), which district is located within the jurisdiction of this Honorable Court.

On March 26, 1958 The Tax Court of the United States entered a decision against Gordon deciding that there are

deficiencies in income and excess profits tax for the taxable period January 1, 1951 to August 31, 1951 in the total amount of \$46,256.88 (R. 62), and on March 19, 1958 entered a decision against Kline deciding that he was liable for such deficiencies as transferee of the assets of Gordon (R. 60). Each of the petitioners on June 9, 1958 filed a petition for review of the Tax Court decision in its or his proceeding (R. 62, 68). This Honorable Court has jurisdiction to review the decisions of The Tax Court pursuant to the provisions of Sections 7482 and 7483 of the Internal Revenue Code of 1954.

STATEMENT OF THE CASE

This case, which was consolidated by order of this Honorable Court dated June 19, 1958 (R. 77), involves petitions to review decisions of The Tax Court of the United States. The Tax Court decided that Gordon owed deficiencies in income and excess profits tax for the taxable period January 1, 1951 to August 31, 1951 in the amount of \$46,256.88 and entered a decision against Kline that he was liable for such deficiencies as the transferee of the assets of Gordon. It has been stipulated that Kline was the transferee of the assets of Gordon upon its complete liquidation in August, 1951 (R. 27). Accordingly, in this case we are concerned with the propriety of the Tax Court's determination that Gordon was not entitled to a claimed loss and had not sustained its burden of proof to establish such loss, and the question at issue is whether Gordon has proven and sustained a recognizable loss in the amount of \$82,518.70 upon the sale of its working interest in two oil and

gas leases, subject to a reserved production payment, and all of its other properties except cash and accounts receivable, which other properties had an adjusted basis of \$332,518.70, for a consideration of \$250,000.00.

SPECIFICATION OF ERRORS

FIRST POINT OF ERROR

The finding of the Tax Court that Gordon had failed to sustain the burden of proof imposed upon it in showing that it sustained a loss of \$82,518.70 on the sale by it of its working interest in two oil and gas leases, subject to a reserved production payment, and all of its other properties except cash and accounts receivable, which other properties had an adjusted basis of \$332,518.70, for a consideration of \$250,000.00 is clearly erroneous and not supported by the evidence.

SECOND POINT OF ERROR

The Tax Court erred in failing to find and hold that Gordon on the aforesaid sale sustained a recognizable loss of \$82,518.70.

THIRD POINT OF ERROR

The Tax Court erred in deciding deficiencies in income and excess profits tax due from Gordon in the amount of \$46,256.88, and by reason of such decision in deciding deficiencies in the same amount against Kline as transferee of the assets of Gordon.

STATEMENT AND ARGUMENT UNDER FIRST AND SECOND POINTS OF ERROR

FIRST POINT OF ERROR—(Restated)

The finding of the Tax Court that Gordon had failed to sustain the burden of proof imposed upon it in showing that it sustained a loss of \$82,518.70 on the sale by it of its working interest in two oil and gas leases, subject to a reserved production payment, and all of its other properties except cash and accounts receivable, which other properties had an adjusted basis of \$332,518.70, for a consideration of \$250,000.00 is clearly erroneous and not supported by the evidence.

SECOND POINT OF ERROR—(Restated)

The Tax Court erred in failing to find and hold that Gordon on the aforesaid sale sustained a recognizable loss of \$82,518.70.

STATEMENT

Gordon was incorporated for the purpose of acquiring, exploring, developing and producing oil and gas properties and throughout the period of its existence conducted that business. On March 22, 1949 Gordon acquired two undeveloped oil and gas leases in the Placerita Field, Los Angeles County, California. On these leases Gordon drilled and equipped 29 producing wells (R. 25).

Kline is a lawyer by profession but also devotes a substantial amount of his time to the oil business as an independent operator (R. 32). There were 32 companies own-

ing properties in the Placerita Field. Kline was familiar with the properties located in that field. (R. 33.)

Kline was acquainted with shareholders in Gordon and Nelson-Phillips Oil Company, which companies owned adjoining leases in the Placerita Field. He had devoted a "great deal" of time to other properties in that field and, upon finding out that differences of opinion had arisen among the shareholders of these companies, reached the conclusion that it might be possible for him to acquire all of the stock of Gordon and Nelson-Phillips Oil Company. To this end he conducted extended negotiations over a period of months. (R. 33.)

Kline conducted his negotiations to acquire all of the outstanding stock of Gordon as a principal and not as an agent for any one. He expected to make a profit in acquiring the stock for his own account. (R. 32.) During the period from March to May, 1951 Kline purchased all of the outstanding capital stock of Gordon for a total consideration of \$3,962,-432.54. (R. 25.) He borrowed the funds with which to acquire the Gordon stock from First National Bank in Dallas and secured the loan by a collateral pledge of the Gordon shares. (R. 36.) After Kline had purchased all of the outstanding capital stock of Gordon he took over control of the company and became a director and its president. (R. 33, 34.)

After Kline had acquired control of Gordon he conducted on behalf of Gordon negotiations with Tevis F. Morrow (herein called Morrow) and A. H. Meadows (herein called Meadows) looking toward a sale of assets by Gordon. (R.

34, 35.) Gordon, as a principal, by proper and appropriate corporate action, executed under date of May 7, 1951, an assignment to Morrow and Meadows, and upon the execution of that assignment there was paid to Gordon the sum of \$250,000.00 in cash. (R. 25, 26.)

The assignment from Gordon to Morrow and Meadows (R. 25, Exh. 3-C) provides in part as follows: (The provisions quoted below are those contained in the Tax Court opinion.)

"For a valuable consideration, cash in hand paid unto Assignor [Gordon] by Assignee [Morrow and Meadows jointly], the receipt of which is hereby acknowledged, and in consideration of the strict and punctual performance by Assignee, its representatives and assigns, of the covenants herein provided to be kept and performed by Assignee, its representatives and assigns, and, subject to the exception and reservation hereinafter stated, Assignor does hereby grant, bargain, sell, convey, assign, transfer, set over and deliver unto Assignee all interests in lands wherever situated and all easements, permits, licenses, servitudes and rights of every character which are useful or appropriate in exploring for, developing, operating, treating, storing, or transporting oil, gas or other minerals, on the date hereof owned or controlled by Assignor, * * * *together with all improvements and all the interests of Assignor in all personal property situated upon or used in connection with mining operations on said lands, and all other tangible personal property or interests therein now owned by Assignor, and all other properties and interests in properties of whatsoever kind or character, except accounts receivable and moneys on hand or on deposit, now owned by Assignor.*

* * * * *

“Assignor hereby excepts from this conveyance and does hereby reserve unto itself, its successors, representatives and assigns, as a limited overriding royalty interest or production payment free of all development, operation, production and other costs and expenses of any kind whatsoever, subject to the limitation hereinafter set forth, an undivided eighty-five per cent (85%) (hereinafter sometimes referred to as the ‘reserved share,’) of ‘Assignor’s interests,’ as hereinafter defined, in all of the oil, gas, casinghead gasoline and other hydrocarbons and other minerals in, under and upon, or that may be produced and saved from the lands described in Exhibit 1. (The two oil and gas leases.)

“(1) As used in the foregoing exception and reservation, the expression ‘Assignor’s interest’ means the working interest share of all the oil, gas, casinghead gasoline and other hydrocarbons and other minerals of any kind whatsoever in, under or upon or that may be produced and saved from the lands * * * which, immediately prior to the execution and delivery of this conveyance, was vested in Assignor and which, from and after the effective date hereof, but for the foregoing exception and reservation, would accrue or belong to Assignee, its representatives and assigns, by virtue of this conveyance.

* * * * *

“(3) The foregoing exception and reservation shall be effective as of the effective date of this conveyance.

“(4) The foregoing exception and reservation shall remain in full force and effect until such time as Assignor, its successors, representatives and assigns, shall have received out of the net proceeds of the sale of the ‘reserved share’ of the oil, gas, casinghead gasoline and other hydrocarbons and other minerals of any kind whatsoever the full net sum of Three Million Six Hundred Thousand Dollars (\$3,600,000), in cash; plus

“(a) an amount equal to the aggregate of all severance and gross production taxes and all other taxes and assessments of any kind whatsoever levied upon or assessed against or measured by the production accruing to the ‘reserved share’ and all *ad valorem* taxes and all other taxes and assessments of any kind whatsoever levied upon or assessed against the property interests hereby excepted and reserved, to the extent, but only to the extent, that any of such taxes or assessments are paid by Assignor; plus

“(b) an additional amount equal to interest from May 1, 1951, on the unliquidated balance of the aggregate of said sum and amount at the rate of five per cent (5%) per annum computed monthly on the basis of a 360-day year, 30-day month, on the first day of each month, beginning June 1, 1951.

“The net proceeds of the sale of the ‘reserved share’ of the oil, gas, casinghead gasoline and other hydrocarbons and other minerals of any kind whatsoever, shall be applied each month by Assignor, its successors, representatives and assigns, first, to the amount equal to interest as specified in subparagraph (4) (b) above; then to the amount equal to the aggregate of all taxes and assessments that are paid by Assignor as specified in subparagraph (4) (a) above; and then to the sum first specified in this paragraph (4).

“(5) It is further understood that upon the aggregate sum and amounts above provided for being paid to and received by Assignor, its successors, representatives and assigns, all rights, titles, and interests hereby reserved unto Assignor shall terminate and thereupon the fractional interest hereby reserved shall be vested in Assignee, its representatives and assigns, free and clear of the exception and reservation herein made, and to evidence the fact, Assignor, its successors, representatives and assigns, will at any time and from

time to time execute and deliver on request all necessary and appropriate acquittances.

“(6) It is understood that Assignee shall never personally be liable for payment of the above described production payment and that Assignor and its successors, representatives and assigns, shall look exclusively to the oil, gas and other minerals reserved herein for the payment thereof, and that Assignor, its successors, representatives and assigns, shall have no lien whatsoever for the payment of said production payment, provided that nothing in this paragraph contained shall impair the obligation of Assignee under subparagraphs (g), (h) and (i) of Paragraph 10 hereof to account to Assignor, its successors, representatives and assigns, for funds which come into the hands of Assignee and which are attributable to the ‘reserved share.’

“(7) The above reservation and exception shall in no sense extend to any lease equipment or other personal property which is included in this sale, all of which equipment and personal property is being sold to Assignee without reservation.

“(8) As a further consideration for this assignment Assignee for itself, its representatives and assigns, covenants and agrees with Assignor, its successors, representatives and assigns, until such time as the aggregate sum and amounts above provided for have been fully paid to and received by Assignor, its successors, representatives and assigns, in a good and workmanlike manner, to develop and operate or cause to be so developed and operated, the oil and gas properties described in Exhibit 1, and to produce oil and gas from the respective wells located on the lands described in Exhibit 1, so long as oil, gas or other hydrocarbons can be produced therefrom in paying quantities, and to comply with all the terms and provisions, both express and implied, of the oil, gas and mineral lease described in Exhibit 1, subject to the proviso stated in

the next succeeding sentence hereof. If Assignee elects to abandon or release any specific portion or portions of the properties described in Exhibit 1 from the operation of such oil, gas and mineral lease, in accordance with the provisions contained in such lease, and thereby be relieved from further obligation as to the property which Assignee desires to abandon or release, Assignee prior to such abandonment or relinquishment shall give to Assignor, its successors, representatives and assigns, thirty (30) days' written notice of such intention, and upon written request of Assignor, its successors, representatives and assigns, or any of them, within said period of thirty (30) days, Assignee, its representatives and assigns, shall execute to Assignor, its successors, representatives and assigns, or such of them as may make said written request, or to the nominee of such of them as may make said written request, a reassignment of the interest in the portion of said lease which Assignee desires to abandon or release, by recordable instrument, in which event Assignee shall be relieved from further obligation with reference to the portion so reassigned, but thereby the amount of the aforesaid production payment and the fraction of the production from the remaining lands described in Exhibit 1 out of which it is dischargeable shall not be reduced, affected or impaired. In the event, Assignor, its successors, representatives and assigns, do not desire a reassignment of said interest, then Assignor, its successor, representatives and assigns, shall join in the execution of a recordable release of said portion of said property in accordance with the provisions of said lease, but thereby the amount of the aforesaid production payment and the fraction of the production from the remaining lands described in Exhibit 1 out of which it is dischargeable shall not be reduced, affected or impaired.

* * * * *

“(10) As a further consideration for this assignment, Assignee for itself, its representatives and as-

signs, covenants and agrees with Assignor, its successors, representatives and assigns, until such time as the aggregate sums and amounts above provided for have been fully paid, to

“(a) Deliver at its own expense in quadruplicate to Assignor, its successors, representatives and assigns, on or before November 15 in each year, beginning with the year 1951, a report prepared by a mutually acceptable geologist, setting forth as of the preceding October 1, an estimate of reserves of recoverable oil, gas and other minerals properly allocable to the interests described in Exhibit 1, the future income to be derived from the sale of such recoverable reserves at prices existing as of October 1 of each year [future income to be set forth by years for a six (6) year period and for future years thereafter as a single period]; and such other geological and scientific data as Assignor, its successors, representatives and assigns, shall reasonably request;

“(b) Obtain from time to time and at any time, on request of Assignor, its successors, representatives and assigns, from persons approved in writing by them, any and all geological, engineering and other scientific data and reports regarding the properties described in Exhibit 1 deemed necessary or appropriate by Assignor, its successors, representatives and assigns, and to deliver the same unto Assignor, its successors, representatives and assigns;

“(c) Deliver in quadruplicate to Assignor, its successors, representatives and assigns, on or before the last day of each month, beginning with the month of June, 1951, a production report in a form approved by Assignor, its successors, representatives and assigns, setting forth the results of operations of the properties described in Exhibit 1 during the preceding calendar month;

“(d) Keep true and correct books and records showing the production of all oil, gas, casinghead gasoline and other hydrocarbons and other minerals of any kind whatsoever from the lands described in Exhibit 1 and all necessary information with respect to such production, to show and determine the ‘reserved share’ of such production;

“(e) Permit Assignor, its successors, representatives and assigns, and the accredited agents and nominees of any of them, at all times to go upon, examine, inspect and remain on all lands described in Exhibit 1, and to examine, audit and make excerpts from any and all books and records of Assignee, its representatives and assigns, regarding the lands and properties described in said exhibit and the production from said lands;

“(f) Deliver to the credit of Assignor, its successors, representatives and assigns, into the pipe lines to which the wells may be connected, free of all charges, the ‘reserved share’ of the oil produced and saved from the lands described in Exhibit 1;

“(g) Account to Assignor, its successors, representatives and assigns, for the net proceeds of the sale of the ‘reserved share’ of the gas, casinghead gasoline and other hydrocarbons other than oil produced from the lands described in Exhibit 1;

“(h) Pay to Assignor, its successors, representatives and assigns, the proceeds of the sale of the ‘reserved share’ of the oil produced and saved from any lands described in Exhibit 1, which on the date hereof is subject to a crude oil sales contract under the terms of which Assignor is not entitled to be paid direct by the purchaser of such production for the ‘reserved share’;

“(i) Account to Assignor, its successors, representatives and assigns, for the ‘reserved share’ of

all gas produced from any lands described in Exhibit 1, which on the date hereof is subject to a gasoline extraction contract under the terms of which Assignor is not entitled to be paid direct by the purchaser of such production for the 'reserved share';

"(j) Pay all taxes and assessments of any kind whatsoever levied upon or assessed against or measured by the production by Assignee of oil, gas, casinghead gasoline and other hydrocarbons or other minerals of any kind whatsoever from the lands described in Exhibit 1, and all *ad valorem* taxes and all other taxes and assessments of any kind whatsoever levied upon or assessed against the lands and properties described in Exhibit 1, which are due and payable after the effective date hereof;

"(k) Comply with all laws and regulations pertaining to the exploration and development of the lands described in Exhibit 1 and the conduct of all operations under the oil and gas mining lease described in said exhibit;

"(l) Pay all costs and expenses incurred in developing and operating the lands described in Exhibit 1 and not permit any mechanic's, materialmen's or laborer's liens to attach to said lands or any interest therein or any personal property thereon.

"(11) An event of default will occur upon the happening of any one or more of the following events:

"(a) Should Assignee, its representatives or assigns, in any respect fail strictly and promptly to keep and perform or to observe any one or more of the conditions, obligations, covenants, promises and undertakings herein provided to be observed, kept and performed by it, and such failure to observe, keep and perform any one or more of such conditions, obligations, covenants,

promises and undertakings continues for thirty (30) days after demand for performance is made in writing on Assignee, its representatives and assigns, or any one or more of them, by Assignor or those successors, representatives and assigns of Assignor at the time holding at least an undivided two-thirds ($\frac{2}{3}$) of the rights, titles and interests hereby reserved unto Assignor; or

“(b) Should there be appointed a receiver of Assignee, its representatives or assigns, or of any of its properties; or

“(c) Should Assignee, its representatives or assigns, be adjudicated an involuntary bankrupt, by a court of competent jurisdiction; or

“(d) Should Assignee, its representatives or assigns, apply to be adjudicated a bankrupt; or

“(e) Should an assignment be made by Assignee, its representatives or assigns, for the benefit of creditors; or

“(f) Should Assignee, its representatives or assigns, fail for sixty (60) days after any money judgment against it shall have become final, to pay such judgment.

“On the occurrence of any event of default, Assignor or those successors, representatives and assigns of Assignor at the time holding at least an undivided two-thirds ($\frac{2}{3}$) of the rights, titles and interests hereby reserved unto Assignor, shall thereupon or thereafter have the continuing and absolute right, privilege and option, until the limited overriding royalty interest or production payment herein reserved has been fully paid, liquidated and discharged, to take over, hold, manage, operate and develop all or any part of the interest of Assignee, its representatives and assigns, in the oil, gas and mineral lease and oil and gas mining leasehold estate described in Exhibit 1 and the lands and properties covered thereby, together

with the interest of Assignee in all machinery and equipment of every kind and character located on said lands or which may be used or useful in the operation of said oil, gas and mineral lease, and the further right to sell all of the oil, gas and other minerals of every kind whatsoever produced, saved, derived, obtained or accruing alike to the interest of Assignor and the interest of Assignee thereunder. If such right, privilege and option be exercised, Assignor, its successors, representatives and assigns, shall not be liable to Assignee, its representatives and assigns, or to anyone claiming or to claim under them, or any of them, for any action or failure to act except as to any such act or omission which is the result of actual bad faith.

“If the aforesaid right, privilege and option is exercised, Assignor, its successors, representatives and assigns, shall be entitled to collect the proceeds of the oil, gas and other minerals accruing both to the interest hereby assigned and the interest hereby reserved unto Assignor. It is understood that no duty is hereby imposed on Assignor to exercise such right, privilege and option, but if it is exercised, then for all costs incurred in the preservation, protection, operation and development of said properties, and in the discharge of any obligations appertaining thereto, together with interest at the rate of six per cent (6%) per annum, computed monthly on the first day of each month from the respective dates of outlay on the unliquidated balance of such costs, Assignor, its successor, representatives and assigns, shall be entitled to reimbursement from the proceeds of production accruing to the interest that by this assignment is vested in Assignee, and for the balance, if any, Assignor shall account to Assignee.

“If such right, privilege and option is exercised, it is understood that Assignor, its successors, representatives and assigns, shall have no title or interest of any character in the personal property and equipment on the lands described in Exhibit 1 and in the properties

and interests in properties conveyed hereby, and shall have solely the entire use of such personal property and equipment, free of any rental costs or other charges whatsoever, for the purpose of operating said premises, and that all such properties shall at all times remain the property of Assignee. Said right, privilege and option may be exercised at any time and from time to time after occurrence of an event of default by Assignor or those successors, representatives and assigns of Assignor at the time holding at least an undivided two-thirds ($\frac{2}{3}$) of the rights, titles and interests hereby reserved, communicating a desire to take over possession of said properties to Assignee, its representatives or assigns, or any one or more of them, whereupon Assignee, its representatives and assigns, shall immediately deliver possession of said premises and do all other acts and things necessary or appropriate to be done to make such right, privilege and option effective. It is further understood that said right, privilege and option is a continuing option and that no exercise of such right, privilege and option shall be held to exhaust said right, privilege and option, but the same may be exercised at any time and from time to time until the limited overriding royalty interest or production payment herein reserved shall have been fully liquidated and paid. (Parenthetical matter added and emphasis supplied.)

The interest reserved by Gordon in the assignment to Morrow and Meadows would be liquidated in full substantially prior to the exhaustion of the economic life of the two leases and was not tantamount to an overriding royalty. (R. 29.)

At the time of the assignment to Morrow and Meadows, Gordon had fully depleted its leasehold cost in both of the leases but had on hand tangible assets either in or on or pertaining to the above-mentioned leases with a then ad-

justed basis for depreciation or for gain or loss of \$332,518.70. (R. 26, 27.) Gordon intended by its assignment to Morrow and Meadows to dispose of all of its interest in the physical equipment in and on the two leases and other tangible assets pertaining thereto. (R. 35.)

Kline on behalf of Gordon negotiated a sale of the working interest in the two leasehold estates and the sale of all of its other properties except cash and accounts receivable with Morrow and Meadows, principally Morrow. (R. 34, 35.) Gordon, because of disputes among its shareholders, had not kept its physical equipment up to the extent that it would have been maintained by a prudent operator. (R. 36.) The consideration of \$250,000.00 paid by Morrow and Meadows to Gordon was agreed upon as a result of the negotiations between them and represented the fair market value, subject to the reserved production payment, of the working interest in the two leases and the tangible property. (R. 35.) Neither Morrow nor Meadows at any time ever had any connection with Gordon as an officer, stockholder, director, or otherwise. (R. 35.)

Following the assignment to Morrow and Meadows, Gordon was dissolved and all of its assets and property then on hand, including the reserved production payment, were distributed in complete liquidation of the company to Kline in cancellation and redemption of all of its outstanding stock. (R. 27.) After Gordon was dissolved and liquidated Kline, as a principal, sold the reserved production payment which he had received in liquidation of Gordon at par, that is \$3,600,000.00, to a purchaser with whom he

never had any connection. (R. 35, 36.) After the sale of the reserved production payment Kline paid off the indebtedness he had incurred with First National Bank in Dallas in connection with procuring a loan from that bank with which to acquire all of the outstanding capital stock of Gordon. (R. 36.)

ARGUMENT

It was on the above record that the Tax Court held that Gordon had failed to sustain its burden of proof that it was entitled to a loss of \$82,518.70. It is well established that where the findings of the Tax Court are clearly erroneous they may be upset on review. *Wener v. Commissioner*, 242 F. 2d 938 (C. A. 9, 1957); *National Brass Works, Inc. v. Commissioner*, 205 F. 2d 104 (C. A. 9, 1953).

All of the facts set out in the preceding statement were either stipulated by the parties or established by uncontroverted testimony. Such facts demonstrate that Gordon sustained a deductible loss in the amount of \$82,518.70 and that the Tax Court finding that the burden of proof was not carried by Gordon is clearly erroneous and without support in the evidence.

The assignment from Gordon to Morrow and Meadows and all other evidence establishes that Gordon sold to them its working interest in the two oil and gas leases and all of its interest in all other properties of whatsoever kind or character except cash and accounts receivable. For the interest assigned to them Morrow and Meadows paid to Gordon a consideration of \$250,000.00 in cash. In the as-

signment to them Gordon reserved unto itself, its successors and its assigns, a production payment free and clear of all costs of development and operation which was dischargeable out of 85% of the proceeds of the sale of runs accruing to the interest in the two oil and gas leases with which Gordon was invested immediately prior to the assignment to Morrow and Meadows in the principal sum of \$3,600,000.00, plus additional amounts equal to the aggregate of all severance, gross production or other taxes measured by production accruing to the reserved payment and all ad valorem taxes assessed with respect thereto and paid by Gordon, and an amount equal to interest at the rate of 5% per annum on the unliquidated balance of said sum.

Gordon at the time of the sale to Morrow and Meadows had no unrecovered leasehold cost. It had an adjusted basis in the physical equipment and inventory in and on or pertaining to the leasehold estates of \$332,518.70. It only received from Morrow and Meadows a cash consideration of \$250,000.00. It did not therefore recover through the medium of that payment a cost basis of \$82,518.70 and such has been recognized and admitted by respondent. (R. 31.) In light of such admission, the real question is not whether the existence of such loss has been established, but whether such unrecovered cost constitutes a deductible loss sustained on the sale or must be allocated to and become the basis of the production payment reserved by Gordon. (R. 31.)

The Tax Court did not really address itself to this pivotal question and certainly did not decide it. Be that as

it may, it stated that "the difficulty with petitioners' position is that the record fails to support their assumption that the tangible property was sold for \$250,000.00 and there is no convincing evidence that the consideration passing to the seller in respect of the tangible property was less than its adjusted basis." Such statement fails to take cognizance of what was actually sold to Morrow and Meadows, or the consideration for the same. What was sold to Morrow and Meadows was the working interest in the two leases subject to the reserved production payment and the tangible property, and for such properties a consideration of \$250,000.00 was paid. The petitioners are therefore not placed in a position of having to establish that only \$250,000.00 was paid for the tangible property, but are placed in a position of demonstrating that for all properties sold to Morrow and Meadows, which included the working interest in the two leases as well as the tangible property, a consideration of only \$250,000.00 was paid.

The uncontroverted facts make it plain that the only consideration received by Gordon was the sum of \$250,000.00. It is axiomatic that the best evidence of value of a property is the price at which the property changes hands in the market place. Fair market value has been defined as "the price at which property would change hands in a transaction between a willing buyer and a willing seller, neither being under any compulsion to buy nor sell and both being reasonably informed as to all relevant facts." *Estate of Singer v. Shaughnessy*, 198 F. 2d 178 (C. A. 2, 1952); *O'Malley v. Ames*, 197 F. 2d 256 (C. A. 8, 1952); *A & A*

Tool & Supply Co. v. Commissioner, 182 F. 2d 300 (C. A. 10, 1950).

The record is clear that Gordon made the sale to Morrow and Meadows as a principal. Neither of the buyers had any connection whatsoever with Gordon. Kline, the president and sole stockholder of Gordon, devoted a substantial amount of time to an independent oil operation and was familiar with the properties located in the Placerita Field. He therefore was in a position to know the value of the properties owned by Gordon. Moreover, he was familiar with the condition of the physical equipment actually on the two leaseholds. He conducted arm's length negotiations with Morrow and Meadows, principally Morrow, and as a result of such negotiations with them a consideration payable to Gordon of \$250,000.00 was agreed upon and such in Kline's judgment "represented the fair market value of the equity (the working interest in the two leases and the tangible property) subject to the oil payment." (R. 35; Parenthetical matter added.)

The assignment from Gordon makes it plain that title to the working interest in the oil and gas leases, subject to the reserved production payment, and all of the other properties of Gordon except cash and accounts receivable passed to Morrow and Meadows. Moreover, it was the intention of Gordon to pass title to this extent.

The uncontroverted testimony establishes that Kline devoted a substantial amount of time to an independent oil operation and that he was familiar with the properties in the Placerita Field and that in his judgment the fair

market value of the properties which were sold to Morrow and Meadows was \$250,000.00. No where in its findings of fact or opinion did the Tax Court make reference to this uncontroverted testimony, which was introduced without objection. This failure goes to the heart of the case. It cannot be denied that Gordon was a willing seller and that Morrow and Meadows were willing buyers. The transaction was negotiated at arm's length. Kline's testimony establishes a consideration of only \$250,000.00, and it is therefore clear that the claimed loss was sustained.

In finding that the petitioners had failed to sustain their burden of proof the Tax Court also relied upon the provisions of the assignment from Gordon to Morrow and Meadows. It reasoned that because, in connection with the production payment reserved by Gordon, Morrow and Meadows covenanted to develop and operate the properties in a good and workmanlike manner and to produce oil and gas so long as they could be produced in paying quantities and because Gordon was entitled to certain visitorial privileges and rights of inspection in connection with covenants contained in the assignment Gordon received additional consideration which may have been paid at least in part for the properties conveyed, thus reducing or eliminating the claimed loss.

The working interest in the leases sold by Gordon was burdened with paying costs of operation and development because Gordon, in reserving the production payment, reserved the same "free of all development, operation, production and other costs and expenses of any kind whatso-

ever." The payment, free of cost, was withheld and reserved in the assignment to Meadows and Morrow and Gordon retained an economic interest in the properties with all the attributes specified in the assignment. *Thomas v. Perkins*, 301 U. S. 655, 81 L. Ed. 1324, 57 S. Ct. 911 (1937); *Commissioner v. Fleming*, 82 F. 2d 324, 327 (C. A. 5, 1936). One of the attributes was that the retained estate was freed of the burden of development and operation. See *GCM* 22730, 1941-1 CB 214, at page 216. This and all of the other so-called "additional considerations" mentioned by the Tax Court relate solely to the nature of the reserved interest or estate and have nothing whatsoever to do with the properties sold to Morrow and Meadows. They cannot be considered as additional consideration for the working interest in the leases and the tangible property.

The position of the Tax Court overlooks the true nature of a production payment. It is a limited overriding royalty, a fundamental characteristic of which is that the leasehold estate is developed and oil and gas are lifted free of cost. This concept of the term comports with the parlance of the oil industry as adopted by the adjudicated cases. Thus, in the case of *Knight v. Chicago Corporation*, 183 S. W. 2d 666 (Tex. Civ. App., 1945), *aff'd*. 144 Tex. 98, 188 S. W. 2d 564 (1945), the court said:

"* * * The words actually used in the lease were, 'Lessee * * * shall not make assignments of undivided interests, overriding royalties or oil payments.' These three classes of assignments mentioned are referred to by Professor Summers as per cent. interests. 3 Sum-

mers Oil and Gas, Perm. Ed. 327, § 556. According to Summers this type of assignment had its origin in the attempted development of oil and gas leases by persons of limited capital. A certain percentage of the lessee's interest would be sold in order to raise funds for drilling costs. We think the terms undivided interest, overriding royalties and oil payments have certain well defined meanings in Texas. All three types of interest are carved out of and constitute a part of the working interest created by an oil and gas lease. An overriding royalty is a certain percentage of the working interest which as between the lessee and the assignee is not charged with the cost of development or production. The oil payment is similar to the overriding royalty, except that the interest of the assignee ceases upon his receiving a certain amount of money or value out of oil or gas produced from a certain percentage of the working interest. The interest commonly spoken of as an 'undivided interest' is an undivided percentage of the working interest, which differs from the oil payment or the overriding royalty in that it is chargeable with its pro tanto share of the cost of development and production."

In *Denver National Bank v. State Commission of Revenue and Taxation*, 176 Kan. 617, 272 P. 2d 1070 (1954), the Supreme Court of Kansas stated:

" * * * The one-eighth share to be paid the landowner or lessor under the common form of lease is known in the trade as royalty. The seven-eighths interest in the oil produced is known as the working interest. Under the simplest situation the parties who owned the lease and drilled the well would own this seven-eighths interest. As it actually works out in practice, however, financial dealings being what they are, several parties may own a share in the working interest. On somebody must fall the expense of raising the oil from the ground and marketing it. Sometimes part of

the working interest is held by a party free and clear of this expense. Such an interest is called an 'overriding royalty'."

In *Cities Service Oil Company v. Geologist Company*, 208 Okla. 179, 254 P. 2d 775 (1953), the Supreme Court of Oklahoma stated that "an overriding royalty is a certain percentage of the working interest which as between lessee and assignee of mineral lease is not charged with the cost of development or production."

In his *Handbook of Oil and Gas Law*, Sullivan states at page 243:

"Oil payments are similar to overriding royalties, i.e., they are assignments or reservations of a fractional part of the working interest which are not charged with the cost of production. They differ in respect to duration: the override continues throughout the life of the lease; the oil payment terminates upon payment of a certain amount of money or value out of oil and gas produced from a stipulated percentage of the working interest."

The Tax Court also mentions that Morrow and Meadows covenanted to operate and develop the two leases in a good and workmanlike manner. This was also an attribute of the reserved interest or estate. Morrow and Meadows also covenanted to comply with the terms and provisions of the two oil and gas leases. On these leases there were 29 producing wells and 31 other companies owned properties in the Placerita Field. There would accordingly, without any provision in the assignment, have been implied to Morrow and Meadows a covenant for diligent and efficient

operation of the leases. Merrill, *Covenants Implied in Oil and Gas Leases* (2d Ed. 1940), Sec. 72. They would also have been required to prevent drainage from the two leases to other properties in the Placerita Field. Merrill, *ibid.*, Section 107.

Likewise the so-called visitorial privileges and rights of inspection are clearly attributable only to the reserved production payment and cannot be called consideration for the properties assigned to Morrow and Meadows. The assignment provides that Morrow and Meadows agree to permit Gordon, its successors and assigns, and the accredited agents and nominees of any of them, at all times to go upon, examine, inspect and remain on the lands conveyed, and to examine, audit and make excerpts from any and all of their books and records regarding the lands and properties conveyed to them and the production from said lands. That such privileges and rights relate only to the reserved production payment is explicit from the provisions of the assignment providing that all of the equipment on the two leases and personal property are being sold to Morrow and Meadows without reservation.

To say that Gordon received consideration (income or return of capital) as a result of the so-called visitorial privileges, rights of inspection or other covenants contained in the assignment, is to say in another context that a landlord receives consideration (income) when he reserves in a lease the right to inspect periodically the leased premises to ascertain that they are being kept in good repair or reserves in connection with a lease based on a percentage

of gross or net the right to inspect and audit the books and records of the lessee or causes the lessee to covenant to utilize the leased premises in a manner so as to produce the greatest possible rental. The fallacy of any such position as to a landlord is patent. The same is likewise true in this case.

The fact that runs of oil or deliveries of gas accruing to a royalty, an overriding royalty or a production payment are lifted free of cost does not result either at the time of the assignment or later in the realization of income by the party reserving the royalty interest. Such is true because, as has been demonstrated, such is one of the attributes of the reserved or retained interest, and we have been unable to find any case in which respondent ever asserted that income would be realized in such a situation. On the contrary, operating expenses are deductible by the owner of the working interest or leasehold estate which is burdened with the royalty interest, even to the extent that such expenses are incurred in connection with lifting free of cost royalty production. Treasury Regulations 111, Section 29.23(a)-1 and 29.23 (m)-16(b) (3) (ii).

The Tax Court in its opinion was concerned with "juggling the cash payment and the so-called retained interest" and increasing the "consideration in respect of other covenants." It felt by reason of such that it might be possible "to obtain a deduction on account of a loss" that was not in fact sustained. Such concern on the part of the Tax Court has no application to this case. Here there was no juggling. The stipulated facts and uncontroverted testi-

mony establish that the consideration of \$250,000.00 paid by Morrow and Meadows to Gordon was arrived at as a result of arms length negotiations between parties acting as principals and between whom there was no connection whatsoever.

It has been demonstrated that the so-called additional considerations are not in reality considerations but only attributes of the production payment reserved by Gordon. It has also been established that the fair market value of the properties sold to Morrow and Meadows, both the working interest and the tangible property, was \$250,000.00; that the only consideration received by Gordon from Morrow and Meadows was cash in the amount of \$250,000.00; and that Gordon's adjusted basis in the properties sold to Morrow and Meadows was \$332,518.70. Accordingly, so far as the maintenance of any burden of proof is concerned, the finding of the Tax Court is clearly erroneous and Gordon is entitled to a deductible loss of \$82,518.70. There remains, however, the real question which was not actually reached in the Tax Court opinion. That is whether the unrecovered cost of \$82,518.70 may be deducted as a loss or must become the basis of the reserved production payment and consequently become recoverable through the deduction for depletion.

It is clear that in addition to a sale of the working interest, subject to the reserved production payment, Gordon sold all of its other properties except cash and accounts receivable, because the assignment provides that:

“Assignor (Gordon) does hereby grant, bargain, sell, convey, assign, transfer, set over and deliver unto

Assignee (Morrow and Meadows jointly)" the aforesaid leases subject to the reserved production payment, *"together with all improvements and all the interest of Assignor in all personal property situated upon or used in connection with mining operations on said lands, and all other tangible personal property or interests therein now owned by Assignor, and all other properties and interests in properties of whatsoever kind or character, except accounts receivable and moneys on hand or on deposit."* (Parenthetical matter added and emphasis supplied.)

The assignment makes it equally clear that the reservation of the production payment resulted in the retention of no interest by Gordon in the other properties which were sold to Morrow and Meadows, because it specifically states that the reservation of the production payment "shall in no sense extend to any lease equipment or other personal property which is included in this sale, all of which equipment and personal property is being sold to Assignee without reservation."

The assignment accorded to Gordon, its successors, representatives and assigns, on the occurrence of an event of default, the right and option to take over the operation of the leases. But, even in the event of the exercise of such option, the assignment is explicit to the effect that Gordon, its successors, representatives and assigns, would only have rent-free use of such personal property and equipment in the operation of the property and "that such properties shall at all times remain the property of Assignee."

The only possibility of any interest in the personal property becoming again the property of Gordon, its successors,

representatives or assigns, was in the event Morrow and Meadows should elect to abandon all or a part of the leases. Such could not be expected because the reserved production payment was expected to be liquidated and fully discharged substantially prior to the exhaustion of the economic life of the leases. In any event, there was no retention of an interest in the other properties because an affirmative act would be required on the part of Morrow and Meadows, and their successors, representatives or assigns, to revest title to any of such other properties in Gordon, its successors, representatives or assigns.

The intention and the act of Gordon were identical. It intended to and did in fact vest full title in Morrow and Meadows to the working interest in the two leases, subject to the reserved production payment, and all of its other properties except cash and accounts receivable. Accordingly, the loss claimed by Gordon is allowable. The allowance of such loss is compelled by the decision of the Supreme Court in *Choate v. Commissioner*, 324 U. S. 1, 89 L. Ed. 653, 65 S. Ct. 469 (1954), affirming 1 T. C. M. 208 (1942).

In *Choate*, a partnership, of which the petitioner was a member, acquired an interest in an oil and gas lease in 1936. The partnership drilled and equipped six producing wells on the property and operated the same until August, 1938. At that time it sold to Sylva Oil Company for a cash consideration of \$110,000, which was not allocated in the contract or assignment, all of its right, title and interest in the lease "together with all wells and the equipment

thereof, including pumps, casings, piping, tanks, lease-house, and all other personal property on or used in connection with said premises, including oil in storage * * *, save and except that assignors herein expressly reserve unto themselves, their heirs and assigns, and do not assign or convey to the assignee hereof $\frac{1}{8}$ of the $\frac{8}{8}$ of all oil and gas and casinghead gas which may be produced and saved by Sylvia Oil Company, its successors and assigns."

The partnership reported the transaction as a sale and allocated \$98,454.70 of the consideration to the leasehold estate and \$11,545.20 to equipment in, on or pertaining to the operation of the lease. This allocation resulted in the showing of a net gain from the sale of the leasehold estate of \$71,870.92, and a loss from the sale of the equipment of \$11,545.30. The Commissioner took the position that the transaction was a sublease inasmuch as an overriding royalty—an interest which would last for the life of the property—had been reserved. He only allowed a deduction from the consideration paid of depletion thereon and the commission paid in respect of the assignment. The Tax Court held the transaction to be a sublease rather than a sale, so that ordinary income subject to the deduction for depletion was realized in respect of the transfer of the leasehold estate. It held, however, that the physical equipment had been sold and that the loss claimed was allowable in respect of the sale of the physical equipment. The Court noted that the assignment involved not only contained "specific reference to the tangible equipment but seems to require the construction that all of petitioners interest for

all time and for all purposes was thereby transferred to the assignee." Such is patently true with respect to the other properties involved in the instant case.

The only difficulty the Tax Court had in allowing the loss in *Choate*, was a sentence in *Cullen v. Commissioner*, 118 F. 2d 651 (C. A. 5, 1941), to the effect that "the cost of equipment * * * may be recovered by the percentage depletion allowance." The Fifth Circuit, in a related case to *Choate*, pointed out that "equipment cost is recoverable through depreciation allowances and not 'by percentage depletion allowances' as apparently was inadvertently stated in *Cullen v. Commissioner*." *Hogan v. Commissioner*, 141 F. 2d 92 (C. A. 5, 1944), cert. denied, 323 U. S. 710, 89 L. Ed. 571, 65 S. Ct. 36.

Before the Supreme Court the only question at issue in *Choate* was the propriety of the allowance of the loss on the sale of the equipment. The Commissioner argued that there was no sale of the equipment and that after the partnership transferred its interest in the lease its investment was no longer in the leasehold equipment as such, but was in the retained interest in the oil enterprise which was depletable only because it was measured only by production. In rejecting this argument, the court stated:

"* * * But there are two difficulties with that argument. In the first place, we find nothing in the Revenue Act of (May 28) 1938, 52 Stat. 447, c 289, 26 USCA Int Rev Acts 1940 ed, p. 995, or in the Treasury Regulations which provides for depletion of equipment used in the operation of oil and gas wells. A deduction

is allowed for depreciation by § 23 (1) 26 USCA Int Rev Acts 1940 ed, p. 1014, which permits a 'reasonable allowance for the exhaustion, wear and tear of property used in the trade or business.' And see Treasury Regulations 101, Art. 23(m)-18. Section 23 (m) provides that in the case of 'mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case' may be taken as a deduction. And see Treasury Regulations 101, Art. 23(m)-10. Depletion is applicable to wasting assets—to the exhaustion of natural resources, not of property used in a business. See 4 Mertens, Law of Federal Income Taxation (1942) § 24.02. That distinction between depletion and depreciation runs through the basis provisions of the Act. See §§ 111(a), 113(a) and (b), 114(a) and (b), 26 USCA Int Rev Acts 1940 ed, pp. 1041, 1048-1054. And the history of the depletion provisions indeed makes clear that only intangible drilling and development costs, not costs represented by physical property, are returnable by way of depletion. See *United States v. Dakota-Montana Oil Co.*, 288 US 459, 77 L. ed. 893, 53 S Ct 435; 4 Mertens, op. cit. § 24.48; Treasury Regulations 101, Art. 23(m)-16(a). In the second place, the Tax Court found that the parties intended a cash sale of the equipment. That question is argued here as if it were open for redetermination by us. It is not. It is the kind of issue reserved for the Tax Court under *Dobson v. Commissioner of Internal Revenue*, 320 US 489, 88 L. ed 248, 64 S Ct 239, and *Wilmington Trust Co. v. Helvering*, 316 US 164, 167, 168, 86 L. ed. 1352, 1354, 1355, 62 S Ct 984. Once a sale of the equipment is conceded, it is not denied that petitioner is entitled to an allowance for the unrecovered cost of the equipment transferred. Sections 111(a), 113(a) and (b). No question is presented concerning the allocation of a portion of the purchase price to the equipment."

If possible the assignment involved in the instant case is even plainer than that involved in *Choate* to the effect that the assignor had forever parted with all of its title and interest in and to the working interest in the oil and gas leases and all of its other properties except cash and accounts receivable. Indeed, this case is stronger than *Choate*, because an allocation was made in *Choate* between leasehold estate and equipment. Here Gordon followed the method of reporting set out in *Louisiana Land and Exploration Company*, 6 T. C. 172 (1946). In *Choate* there was an over-all profit on the transaction; in this case there was a loss. Moreover, *Choate*, for tax purposes, involved a sublease, whereas the sale to Morrow and Meadows was, for tax purposes, a sale as to which long-term capital gain treatment could have been accorded. *Section 117(j), Internal Revenue Code of 1939; Columbia Oil & Gas Co. v. Commissioner*, 119 F. 2d 459 (C. A. 5, 1941).

In its opinion the Tax Court took the following position:

“Petitioners’ reliance upon *Choate v. Commissioner*, 324 U. S. 1, is misplaced. No issue was raised in that case as to whether a loss was actually sustained; that fact was assumed, and the Supreme Court explicitly noted that no question was ‘presented concerning the allocation of a portion of the purchase price to the equipment,’ * * *.”

That position of the Tax Court is not well taken. The question in *Choate* was the propriety of the allowance of a loss on the disposition of physical equipment. We have demonstrated in this case that a loss of \$82,518.70 was actually sustained and proven. True, there was no alloca-

tion of the \$250,000.00 between leasehold estate and tangible property. There was no occasion to make any such allocation in this case as there was in *Choate*. In *Choate* a loss was claimed on the disposition of the physical equipment and a profit was recognized as to a disposition of the leasehold estate. Here the entire consideration of \$250,000.00 was paid for the working interest in the two oil and gas leases, subject to the reserved production payment, and all other properties of Gordon except cash and accounts receivable. That consideration lacked \$82,518.70 of equalizing Gordons adjusted basis in all of the properties sold to Morrow and Meadows. A loss was sustained and the decision in *Choate* as well as *Section 117(j) of the Internal Revenue Code of 1939* compels its allowance.

The respondent recognizes that the basis of Gordon in the other properties transferred to Morrow and Meadows may be offset to the full extent of the \$250,000.00 cash payment. He does, however, insist that the remainder thereof become a part of the depletable basis of the reserved production payment. The Tax Court's decision sanctions this position, although it is obviously paradoxical. If Morrow and Meadows had paid to Gordon \$400,000.00 for the property transferred to them, then Gordon would have been allowed to offset its full adjusted basis in the other properties against the cash consideration paid. G. C. M. 23623, 1943 C B 313. Inasmuch as Gordon had owned the leases for more than six months, the excess of such price would have been accorded long-term capital gain treatment. *Section 117(j), Internal Revenue Code of 1939; Columbia Oil*

and Gas Company v. Commissioner, supra; *I. T. 3693, 1944, C B 272*. In the Tax Court's view, we therefore have a situation in which gain, but not loss, may be recognized. We find no authority in Section 117(j) or the other pertinent provisions of the 1939 Code to recognize a gain, if one exists, but to disallow a loss in the same type of transaction in which a gain would be recognized.

The properties other than the working interest which were transferred to Morrow and Meadows were either inventory items or properties through which cost was properly recoverable by the deduction for depreciation. Depreciation and depletion are separate and distinct. They do not pertain to the same property interest. Inventory items enter into a determination of gross income. The decision in *Choate* makes it clear that in a taxable transaction there may not be attributed to a retained depletable asset unrecovered cost in an inventory item or a depreciable asset. The transaction involved in this case does not come within any of the non-recognition provisions of the 1939 Code and, accordingly, the unrecovered cost in inventory and depreciable property may not be transferred to the retained depletable asset.

STATEMENT AND ARGUMENT UNDER THIRD POINT OF ERROR

THIRD POINT OF ERROR—(Restated)

The Tax Court erred in deciding deficiencies in income and excess profits tax due from Gordon in the amount of \$46,256.88, and by reason of such decision in deciding

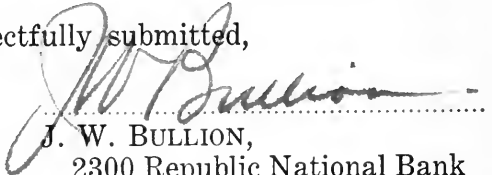
deficiencies in the same amount against Kline as transferee of the assets of Gordon.

Under the facts and argument set forth under the First and Second Points of Error it has been demonstrated that Gordon on the sale of its working interest in two oil and gas leases, subject to a reserved production payment, and all of its other properties except cash and accounts receivable sustained a deductible loss of \$82,518.70. Accordingly the Tax Court erred in determining against Gordon for the taxable period January 1, 1951 to August 31, 1951 deficiencies in income and excess profits tax in the total amount of \$46,256.88. Inasmuch as it erred in such decision as to Gordon, it erred in deciding that Kline was liable for such deficiencies as the transferee of assets of Gordon.

CONCLUSION

The decisions of The Tax Court should be reversed.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "J. W. Bullion", is written over a horizontal dotted line. The signature is fluid and cursive.

J. W. BULLION,
2300 Republic National Bank
Building,
Dallas, Texas,
Attorney for Petitioners.

APPENDIX
EXHIBITS

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No. 16246
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

In the Matter of

GAETAINO DIANO, on Habeas Corpus,
Appellant.

APPELLEE'S BRIEF.

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In the Matter of

GAETAINO DIANO, on Habeas Corpus,

Appellant.

APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction to review the final order of deportation made pursuant to Section 241(a)(2) and (9) of the Immigration and Nationality Act of 1952, Title 8 U. S. C. Sections 1251(a)(2) and (9), by virtue of Congressional authorization contained in Title 5, U. S. C. Section 1009; Title 8, U. S. C. Sections 1251 and 1329, and Title 28, U. S. C. Sections 2201 *et seq.*

This Court has jurisdiction to review the judgment upholding the deportation order by virtue of the authorization contained in Title 28, U. S. C. Sections 1291 and 1294(1).

Statutes and Regulations Involved.

Section 241(a)(2) and (9) of the Immigration and Nationality Act of 1952 (8 U. S. C. 1953 Ed., 1251(a)(2) and (9)) provide:

§241 Deportable Aliens—General classes

(a) Any alien in the United States (including an alien crewman) shall, upon the order of the Attorney General, be deported who—

* * *

(2) entered the United States without inspection or at any time or place other than as designated by the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States;

* * *

(9) was admitted as a nonimmigrant and failed to maintain the nonimmigrant status in which he was admitted or to which it was changed pursuant to section 1258 of this title, or to comply with the conditions of any such status; . . .

Section 101(a)(15)(D) of the Immigration and Nationality Act of 1952 (8 U. S. C., 1953 Ed., 1101(a)(15D)) provides:

§101 Definitions

(a) As used in this chapter—

(15) The term “immigrant” means every alien except an alien who is within one of the following classes of nonimmigrant aliens—

* * *

(D) an alien crewman serving in good faith as such in any capacity required for normal operation and service on board a vessel (other than a fishing

vessel having its home port or an operating base in the United States) or aircraft, who intends to land temporarily and solely in pursuit of his calling as a crewman and to depart from the United States with the vessel or aircraft on which he arrived or some other vessel or aircraft; . . .

Statement of the Case.

The facts of this case are not in dispute. Appellant is an alien, a native, and a citizen of Italy. He last entered the United States at the Port of New York, New York, on January 13, 1957 as a "nonimmigrant" crew-member of the "Ragunda." In accordance with the regulations of the Immigration Service he was authorized by the examining immigration officer to land temporarily for the period that the ship was in the United States "not exceeding twenty-nine days in the aggregate," 8 C. F. R. 252.1(d). Contrary to these conditions appellant failed to depart with the "Ragunda" and has remained in the United States. The twenty-nine-day period expired February 11, 1957.

On July 28, 1958, deportation proceedings were duly instituted. Appellant was arrested pursuant to a valid immigration warrant. He was formally notified that he would be held in custody until the conclusion of a hearing held to determine his deportability. Appellant was told that he could appeal this custody-order, but he did not choose to do so. He was charged with violating Section 241(a)(2) and (9) of the Immigration and Nationality Act of 1952, 8 U. S. C. 1251(a)(2) and (9) for the reason that after being temporarily admitted as a "non-immigrant" as defined by Section 101(a)(15)(D), 8 U.

S. C., Section 1101(a)(15)(D), he failed to comply with the conditions in his permit to enter by remaining in the United States for a longer time than allowed.

Pursuant to Section 242 of the Immigration and Nationality Act (8 U. S. C. Sec. 1252(b)) and the applicable regulations (8 C. F. R. 242.16) appellant was granted a hearing to show cause why he should not be deported. Following appellant's admission of the charges contained in the order to show cause, the Special Inquiry Officer entered his decision that appellant was deportable as authorized by the regulations, 8 C. F. R. 242.16(b). The Officer informed appellant of his right to appeal from the decision, but appellant declined to do so.

On August 4, 1958 an application for Writ of Habeas Corpus was filed in appellant's behalf. The application contained a prayer asking the court to admit appellant to bail. That same day the District Court issued an order to show cause why the writ should not issue, and on August 8, 1958 the government filed its return in opposition. On August 12, 1958 the District Court held that the appellant was deportable and not entitled to bail.

The appeal from the judgment below, filed on September 2, 1958, alleges a violation of due process on two grounds. First, appellant contends that the proceedings by which he was found deportable offended due process because of the speed with which they were completed. Second, he claims that the District Court's denial of bail contravenes the requirements of due process.

VALIDITY OF THE DEPORTATION ORDER.

I.

Appellant's Hearing Before the Immigration and Naturalization Service Afforded All the Protections Guaranteed Him by the Due Process Clause.

Appellant contends that the mandates of due process have been violated in that the proceedings to determine his deportability took no longer than twenty-four hours. However, fairness accorded rather than time consumed constitutes the criteria for due process.

“ . . . with respect to due process [an alien] is entitled to procedural due process, that is, that he be given notice of the hearing and an opportunity to show that he does not come within the classification of aliens whose deportation Congress has directed.”
United States ex rel. Harisiades v. Shaughnessy,
187 F. 2d 137 (2d Cir., 1951), aff. 342 U. S. 580,
reh. den. 343 U. S. 936.

Not one facet of appellant's hearing was tainted with unfairness. Pursuant to Congressional authorization, Section 242 of the Immigration and Nationality Act of 1952, 8 U. S. C. Section 1252(b), a Special Inquiry Officer took charge of the proceeding. He fastidiously adhered to the rules and regulations applicable to Section 242 of the Act. An interpreter was present throughout. The entire hearing was conducted in Italian, appellant's native tongue. The Officer explained at the outset that the purpose of the hearing was to determine appellant's right to be and to remain in the United States and to give him an opportunity to show cause why he should not be deported. After every explanation, the Officer paused to ask appellant whether he understood. In each instance appellant answered in the affirmative. The Officer in-

formed appellant of his right to counsel and inquired whether he had retained such assistance. Receiving a negative reply, he inquired whether appellant was willing to continue without such representation. Appellant stated that he was. The Officer advised appellant of his right to examine the evidence against him, to submit evidence in his own behalf, and to cross-examine any witnesses who might be presented by the Government. Appellant did in fact examine the order to show cause and notice of hearing and stated that the signatures thereon were his own.

The Officer asked appellant after he was sworn whether he understood that he had stayed in this country longer than permitted by the law. Appellant replied that he understood that he had done so and that he had left the ship with the intention of so doing. Pursuant to the authority contained in Regulation 242.16(b) (8 C. F. R., 1958 rev.) the Officer told appellant that on the basis of the allegations in the order to show cause and appellant's testimony, he was entering decision ordering deportation. Immediately the Officer explained to appellant that he had the right to appeal from this decision. When asked whether he wished to appeal, appellant replied that he did not.

Appellant contends that the proceedings were unreasonably short, but he has given the Court no grounds for concluding that he could have made use of lengthier proceedings. Nor has he ever disputed the result reached. His only objection is with the dispatch with which it was reached.

It may be noted that courts are empowered to review determinations by the Attorney General regarding detention, bail and parole pending final determination of deportability where "the Attorney General is not proceeding

with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.” (Section 242 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1252(a).) Further, it may be noted that there was but one simple fact issue in this case.

II.

Since No Prejudice Resulted to Appellant From the Speed of the Proceeding, Even if Such Were Considered Error, It Must Be Deemed Harmless.

Even assuming for the purpose of argument that the speed of the proceeding constituted error, appellant can show no prejudice resulting therefrom. Accordingly, the error, if any, must be disregarded. The standard of fairness required for deportation proceedings is not violated by defects save where they lead to a denial of justice. See *Application of Orlando*, 131 Fed. Supp. 485 (N. D. N. Y. 1954), aff. 222 F. 2d 537 (2d Cir., 1955), cert. den. 350 U. S. 862; *Marcello v. Ahrens*, 212 F. 2d 830, 837 (5th Cir., 1954), 348 U. S. 805, reh. den. 350 U. S. 856.

Appellant admits entry into the United States contrary to law. The fact content of his admission constitutes grounds for deportation. Moreover, the admission taken alone, without corroboration, is sufficient to sustain the deportation order, for in deportation proceedings the alien's own admissions constitute substantial evidence. *Goncalves Rosa v. Shaughnessy*, 157 Fed. Supp. 907 (S. D. N. Y., 1957).

In *Sumio Madokoro v. Del Guerio*, 160 Fed. 164 (9th Cir., 1947), cert. den. 332 U. S. 764, this Court was presented with a similar fact situation. In that case the appellant, a Japanese, contended that he had been denied due process during his deportation hearing because the offer of

counsel by the Service was meaningless since there were none in the vicinity. This Court did not reach the question of whether due process had been denied with respect to the privilege of counsel. It stated:

“We think it unnecessary to determine whether there was here a denial of due process, for all the facts elicited from the appellant at the Fort Lincoln hearing relative to the deportation of such alien are admitted to be true. Failure to have counsel, if error, like other errors may not be prejudicial. If there be a presumption that the denial of due process is presumed prejudicial, that presumption is overcome by appellant’s admissions here.”

160 F. 2d 164, 167.

See also *Cauto v. Shaughnessy*, 218 F. 2d 758, 760 (2d Cir., 1955), cert. den. 349 U. S. 952; *Alesi v. Cornell*, 250 F. 2d 877 (9th Cir., 1957); *Del Bernardo v. Rogers*, 254 F. 2d 81, 82 (C. A. D. C. 1958).

III.

The Immigration and Naturalization Service Complied With All Regulations Governing Deportation Proceedings.

Appellant seems to contend in his first point that the Service violated not only the due process clause of the Constitution but also the Regulations applicable and enacted pursuant to the authorization contained in Section 242 of the Immigration and Nationality Act of 1952 (8 U. S. C. Sec. 1252(b)) under which appellant was found deportable. On page four of his brief appellant quotes from the 1952 edition of volume eight of the Code of Federal Regulations, Section 242.51. The 1952 edition has been replaced, however, by an edition published January 1, 1958 which includes all rules and regulations pub-

lished in the Federal Register on or before December 31, 1957. The Regulations were republished in their entirety "because of the numerous amendments which have been made in Title 8, Chapter I of the Code of Federal Regulations." (22 F. R. 9705, Dec. 6, 1957.) Section 242.50 quoted by appellant has been deleted in the revised edition.

The Government refers the Court to the current Regulations governing deportation proceedings. (8 C. F. R. (1958 Ed.) 242.1-242.23.) These regulations have been complied with in every respect.

EFFECT OF COURT'S REFUSAL TO GRANT BAIL.

IV.

The District Court Did Not Err in Refusing to Admit Appellant to Bail Pending Its Review of the Deportation Order.

The Application for Writ of Habeas Corpus filed with the District Court contained a prayer that the appellant be admitted to bail. When the court denied the writ, it also refused to fix bail. Now appellant seems to contend that the District Court erred in refusing to admit him to bail for the three-week period between the filing of the above Application on August 4, 1958 and the entry of the judgment denying the Writ of Habeas Corpus on August 25, 1958. Appellant has never requested bail pending review in this Court.

The action of the District Judge in refusing to set bail for appellant was clearly within his discretion. Congress has expressly authorized the Attorney General to determine in his discretion whether or not the alien should be admitted to bail after entry of an order to deport pending its execution. (Section 242 of the Immigration and Nationality Act of 1952, 8 U. S. C. 1252(c).) While courts

may have some power to admit an alien to bail during this period contrary to a decision of the Attorney General, such power may only be exercised where there is a clear and convincing showing that the decision to hold the alien without bond is arbitrary and without reasonable foundation.

Appellant has made no showing that the refusal of bail was arbitrary. Obviously, there was no delay in the proceedings to determine his deportability. Nor was there any delay in effectuating the alien's departure for the Attorney General was prepared to execute the order within eleven days of its entry. Review by the District Court took but three weeks and was completed less than a month after entry of the final order of deportation. Coupled with the dispatch with which these proceedings have been concluded are two inescapable facts: to wit, that appellant has demonstrated already his unreliability by violating the conditions of his landing permit and that his first apprehension took over eighteen months. Under these circumstances no justification exists for admitting appellant to bail.

In *United States ex rel. Fook Tong v. Watkins*, 58 Fed. Supp. 906, 908 (S. D. N. Y., 1944), the alien, a Chinese, admitted illegal entry into the United States but contended that error had been committed in the selection of India as the country to which he was to be sent, China then being embroiled in war, and in the denial of bail after the entry of the deportation order pending its execution.

The Court held that India was a reasonable alternative under the circumstances and denied bail for reasons applicable to the instant case:

“When we consider the mass of work to be done in each deportation proceeding handled and the number

of such cases in the Department of Justice, it seems manifest that the delay in the present case has not been unduly great; certainly not sufficient to be characterized as unreasonable. Through his illegal entry, the alien has been able to remain in this country two and a half years. Not improbably his release on bail now would result in considerable difficulty in retaking him for the purpose of executing the deportation order.

“Moreover, the alien is not entitled of right to bail. *United States v. District Director of Immigration, etc.*, 2 Cir., 120 F. 2d 762, 765. Whether bail should be allowed is—at least in the first instance—for the determination of the Attorney General. There is no showing that he has sought the Attorney General’s authorization of bail nor is there any basis for his suggestion that any one in the Department of Justice has acted unreasonably in denying bail.

“If it be assumed (though I do not so hold) that the court is empowered to pass on the matter, the record discloses no ground whatever for granting bail.” 58 Fed. Supp. 906, 908.

V.

The Question of Whether or Not the District Court Erred in Refusing to Grant Bail Is Now Moot.

Appellant’s complaint is with the District Court’s refusal to admit him to bail for the three-week period pending its review of the deportation order. Even assuming that the court below erred in denying appellant bail, there is no relief that this Court can grant him. When the District Court denied the Writ of Habeas Corpus, the question of whether bail should have been granted pending its decision became moot. Similarly where an appellate court upholds an order to deport, the question of whether the

District Court erred in denying bail pending its review of the order is moot. In *United States ex rel. Belfrage v. Kenton*, 224 F. 2d 803 (2d Cir., 1955), appellant was administratively denied bail pending the deportation hearing but obtained judicial bail on Writ of Habeas Corpus. After the final order of deportation was entered, he was retaken into custody. He sought another Writ of Habeas Corpus challenging both the deportation order and the denial of bail pending review of that order. The district court affirmed both orders and was in turn affirmed by the Court of Appeals for the Second Circuit which stated:

“As we are of the opinion that the deportation order is valid and ought to be affirmed, whether the denial of bail was erroneous now presents but an academic question which we will pass without discussion.” (224 F. 2d 803, 804.)

Conclusion.

It is respectfully submitted that the decision of the District Court, affirming the decision of the Special Inquiry Officer that the appellant is deportable and refusing to admit appellant to bail, be affirmed.

Respectfully submitted,

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